No. 4412

United States

Circuit Court of Appeals

For the Ninth Circuit.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorney for Defendant in Error.

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

IN EQUITY—No. E–29 (PRESCOTT).

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

BILL OF COMPLAINT.

The above-named complainant, complaining of the above-named defendant, for cause of action avers:

I.

That the complainant now is and at all times hereinafter mentioned has been a citizen of the

United States and an inhabitant and resident of the southern district of California; and that defendant Navajo County is a political subdivision of the State of Arizona, and is included within the Prescott division of the District Court of the United States, for the District of Arizona.

II.

That the amount in controversy in this suit exceeds the sum of three thousand dollars, exclusive of interest and costs, and that the jurisdiction of this Honorable Court depends upon diversity of citizenship of complainant and defendant.

That on the 5th day of September, 1916, and for a long time prior thereto, this complainant under the name and style of Mesmer & Rice, was a contractor engaged in the business of erecting bridges and in response to an invitation and call for bids prior to the 5th day of September, 1916, advertised by defendant [1*] for the construction of certain bridges for which appropriations had been theretofor made by defendant, complainant submitted to defendant his bid for the construction of certain bridges to be erected by the defendant and particularly for that cerain bridge to be erected by defendant across the Little Colorado River near Winslow, Arizona, hereinafter referred to as contract #1, Bridge T–3, and that said bid was accompanied by specifications prepared by complainant and a proposal to erect and contract said bridge T–3 for certain sums, dependent upon the design and construction desired by defendant, among which

*Page-number appearing at foot of page of original certified Transcript of Record.

specifications was a proposal to construct said bridge according to specifications therewith submitted for the sum of $23,800.00. Said proposal contained a provision designed by the complainant and intended by complainant to be understood by defendant to cover extras and additional quantities of material which might be by defendant required or designated to be used, which provision is in words and figures as follows, to wit:

"If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place .. $20.00 per yd.

(b) Additional structural steel in place ..... 7.5¢ per lb.

(c) Additional reinforcing steel in place ..... 7¢ per lb.

(d) All other work will be done on the percentage basis at actual cost plus 15%."

That said proposal contained the provision hereinabove set forth and referred to was and is in words and figures as follows, to wit:

"We the undersigned, hereby propose to furnish all materials and all labor necessary and requisite to perform and complete in a first class and workmanlike manner the construction of the seven new steel bridges to be built in Navajo County, Arizona as per General Specifications prepared by Mr. Charles F. Perkins, County Engineer, Holbrook, Arizona, and per specifications and drawings submitted herewith, for the following prices for each bridge separately. [2]

Contract #1—Bridge T–3 over Little Colorado River near Winslow as shown on drawing #4183, with 14′ roadway concrete floor steel joists, steel railing, resting on steel concrete pier, with number of trusses as shown, with all field connection riveted, all for *for* the sum of $31,242.00.

(a) REGULAR DESIGN, with three spans as described above.

(b) Same as (a) except with wood floor and steel joists for $23,800.00

(c) Same as (a) except with wood floor and wood joists for 22,050.00

(d) Same as (a) except with 12′ roadway for 28,894.00

(e) Same as (d) except with wood floor and steel joists for 21,610.00

(f) Same as (d) except with wood floor and wood joists for 20,170.00

(aa) ALTERNATE DESIGN, as described under (a) except five spans 25,290.00

(bb) Same as (aa) except with wood floor and steel joists for 19,000.00

(cc) Same as (aa) except with wood floor and wood joists for 17,220.00

(dd) Same as (aa) except with 12′–0″ roadway for 24,520.00

(ee) Same as (dd) except with wood floor and steel joists for 18,400.00

(ff) Same as (dd) except with wood floor and wood joists for 17,030.00

(g) For wood railing instead steel railing deduct 500.00
(b) For bolting field connections instead of riveting deduct 250.00
(j) For concrete web between steel cylinders, add ..... 25.00 per yd.

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place... 20.00 per yd.
(b) Additional structural steel in place 7.5¢ per lb.
(c) Additional reinforcing steel in place 7¢ per lb.
(d) All other work will be done on the percentage basis, at actual cost plus 15%.

All the above proposals, while bid on separately, are for all seven bridges and cannot be accepted for any one bridge. If, however we are low bidder on 75% or 80% of the work, we will entertain a proposition from your honorable board, but it is our intention to do all of the work and we have bid accordingly.

Respectfully submitted,
MESMER & RICE,
By LOUIS F. MESMER.

Holbrook, Arizona, July 1, 1916."

III.

That on the 7th day of August, 1916, the Board of Supervisors of Navajo County, defendant above named, having regularly convened for the purpose of acting upon the proposals and specifications submitted by complainant for the erection of the bridges mentioned, made and entered its order

that the [3] bid of complainant submitted under the firm name of Mesmer & Rice, of Los Angeles, California, being the lowest and best bid received for the construction of the bridge across the Little Colorado River, near Winslow, at a cost of $23,-800.00, the same was accepted and approved subject to approval of contract, specifications and plans therefor by the United States Indian Department, which department was to pay one-half the cost of the construction of said bridge; and that thereafter, pursuant to said order, entered into a contract and agreement with complainant, under and by the terms of which complainant was authorized to enter upon the construction of said bridge T–3, for the sum of $23,800.00; and in addition thereto it was provided by the terms of said contract that the extra substructure of said bridge was to be paid for "as per addenda for extras upon the proposals accepted."

Such contract is in words and figures as follows, to wit:

"This agreement, made and entered into this 5th day of September, A. D. 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part and Louis F. Mesmer, doing business under the name of Mesmer & Rice, of Los Angeles, California, the party of the second part.

WHEREAS the party of the first part heretofore advertised for bids for the construction and building of certain bridges, and

WHEREAS said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the third day of July, A. D. 1916, for the construction and building of the bridge hereinafter mentioned, and

WHEREAS, the party of the second part submitted bid for constructing and building said bridge, and

WHEREAS, the said bid of the party of the second part appears to be the lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and

WHEREAS, for the purpose of identification and to set forth more fully the provisions and stipulations of said contract, said call for bids with specifications for such bridge is hereto attached and made a part hereof, and

WHEREAS, for the same purposes the said bids are hereto attached and made a part hereof, and

WHEREAS, the said party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described, for the sum of Twenty-three Thousand Eight Hundred and no/100 ($23,800.00) Dollars.

NOW THEREFORE, the said party of the second part has agreed, and by these presents does agree to and with the party of the first part, for and in consideration of Twenty-three Thousand Eight Hundred and no/100 ($23,800.00) Dollars [4] to furnish all the material and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications desig-

nated and attached hereto and made a part hereof, to construct and erect the following bridge, upon the site herein named, to wit:

Bridge T–3 over Little Colorado River, east of Winslow.

Superstructure—3–165′–4″, riveted H–T, steel spans as per superstructure plan on drawing No. 4183; superstructure to be as follows (as per addenda for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8′ in diam.; filled with a rich concrete resting upon twelve piles driven to a refusal of a fifteen tons load each; the upper steel cylinder to be fifteen feet in length or such that its upper end will be level a point two feet above the bottom chord of the adjoining A. T. & S. F. R. R. bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be six feet in diam. and filled with a rich concrete mixture connected with the lower concrete by 12 1″ twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18″ reinforced concrete wall of an equal length with the said upper cylinders and abutments to consist of two thirty foot steel cylinders each, six feet in diam.; filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall. It is further agreed that in the event of any changes being made by the party of the first part, or any extra required by the party of the first part, such charges of extras shall be

made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore described according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party of the second part in constructing said bridge in accordance with cause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the aforesaid bridge shall be made immediately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law ~~except~~[1]. [5]

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

It is also stipulated that as an evidence of good faith in the performance of this contract, the said

Louis F. Mesmer will furnish and give to the party of the first part good and sufficient bond in the penal sum of six thousand dollars.

The party of the second part shall provide sufficient safe and proper facilities at all times for the inspection of the work by the party of the first part, or its agent, and shall within twenty-four hours after receiving written notice from the party of the first part, or its agent, to that effect, proceed to remove from the grounds all materials, which may be condemned, whether worked or unworked, and to tear down all portions of the work which may be condemned by the party of the first part or its agent, as unsound and improper or in any way failing to conform to the plans and specifications hereinbefore mentioned, and it is understood that the party of the first part will at all times have an inspector present during the progress of the work on the bridge hereinbefore mentioned, and if not, this clause in this contract is null and void.

Should the party of the second part be obstructed or delayed in the prosecution of completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The party of the second part agrees and stipulates that if he shall delay the material progress of the work so as to cause any damage for which

the party of the first part may become liable, or perform any other act for which the party of the first part may become liable, then and in that event the party of the second part shall make good to the party of the first part any such damage.

If at any time there shall be evidence of any lien or claim for which, if established, the party of the first part might become liable, and which is chargeable to the party of the second part, the party of the first part shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to indemnify it against such lien and claim, and should there prove to be any such claim, after all payments are made, the party of the second part shall refund to the party of the first part all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the default of the party of the second part.

It is further mutually agreed by and between the parties hereto that no certificate given nor payment made under this contract except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed as an acceptance of defective work or improper materials.

It is also understood and agreed that A and B Company Standard Specifications for highway bridges have been and are hereby [6] adopted as the general reference for the construction of the bridge mentioned herein.

The said parties for themselves, their successors and assigns, heirs, administrators and executors, do hereby agree to the full performance of the covenants herein contained, and conform to the specifications and plans hereto annexed and made a part thereof, except where either of same may be changed in accordance with the provisions hereinbefore mentioned.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands the day and year first above written.

NAVAJO COUNTY.
By R. C. CRESWELL,
Chairman,
GEO. W. HENNESSEY,
Member,
Q. R. GARDNER,
Member,
Board of Supervisors.
[Seal] Attest: DEE M. MOSS,
Clerk, Board of Supervisors.
LOUIS F. MESMER,
Doing Business Under Name of Mesmer & Rice.

IV.

Complainant avers that under the terms of said contract he entered upon the construction of said bridge, but that thereafter, and from time to time during the performance of labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to and required of complainant that certain changes and alterations be made in the original specifications,

which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras, as set forth in said proposal, contract and specifications.

V.

That on the ninth (9) day of August, 1916, and after the original proposal, plans and specifications for the erection of said bridge had been submitted by complainant and accepted by [7] defendant, said defendant was advised that through an appropriation by the United States Government to be disbursed through the Commissioner of Indian affairs, there would be available for the construction of said bridge, and in addition to the sum appropriated by defendant, the sum of $15,000.00. This sum was, however, available upon condition, as complainant is advised, that the original plans and specifications so submitted by complainant should be changed and altered in a manner so as to permit the construction of a stronger structure, and in a manner to be approved by the Commissioner of Indian Affairs. That it was not, however, at this time known, either to the complainant or to defendant, the exact nature of such changes nor the expense which would be incident thereto, for which reason complainant avers, it was agreed, or should have been agreed between complainant and defendant, that such changes as were for this reason required to be made should be paid for as extras,

according to the price and terms of that portion of complainant's contract hereinabove in paragraph II of this complaint particularly referred to and set forth, and complainant, relying upon this understanding and agreement so had with defendant, completed said bridge in compliance in all respects, with the contract and agreement, at an expense to him, over and above the original contract price of $23,800.00, of the sum of $13,-973.65, which sum, complainant avers became and was a necessary expenditure by reason of the changes directed by defendant, as aforesaid, in the construction of said bridge with sub-structure and approaches.

VI.

That upon the completion of said bridge by complainant on or about the 3d day of December, 1917, complainant presented to defendant, through its Board of Supervisors, statement of the amount due him, on account of labor and materials performed and supplied for the construction of said bridge under the conditions hereinabove [8] set forth, showing a balance due from defendant to complainant of the sum of $13,973.65 and that on said date complainant was finally advised that defendant claimed and would claim that all of the work so by complainant performed upon said bridge and all of the supplies and materials entering into the erection and construction thereof were by defendant understood and assumed to be included in the sum of $23,-800.00, being the original contract price submitted in the original bid of complainant, and that notwith-

standing the fact that the expense of constructing said bridge had entailed an actual loss to complainant, over such contract price of the sum of $13,973.65, said defendant through its Board of Supervisors, assuming to act, as complainant is advised and believes and so avers, through the advice of the County Attorney of said Navajo County, construed and would construe said contract as a contract entitling complainant to no more than the said sum of $23,800.00.

That complainant has at various and divers times since said third day of December, 1917, attempted to reach an agreement and adjustment with defendant, but that said defendant, through its Board of Supervisors and its County Attorney, has persisted in refusing to construe said contract as entitling complainant to more than the sum of $23,800.00, and has refused, and still does refuse, to construe that portion of said contract covering extras as entitling complainant to any extra compensation arising through changes and modifications of the original specifications, so as aforesaid made necessary by the demands and requirements of defendant and its officers and agents.

VII.

Complainant avers that subsequent to the 9th day of August, 1916, defendant, its officers and agents, entered into a series of conferences with representatives of the Indian Department of the United States Government for the purpose of determining what changes and alterations from the original plans and specifications [9] submitted by complainant would be made necessary so as to meet the re-

quirements of the Indian Department and permit defendant to avail itself of the $15,000.00, so as in this complaint alleged, appropriated by said Indian Department. That by reason of such acts on the part of the defendant, its officers and agents, complainant was prevented from entering upon the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original specifications, and was delayed in the commencement of said work during the year 1916 and subsequent to the 9th day of August, until the year 1917; that such delay ensuing and so caused as aforesaid, was without the fault of complainant and resulted in preventing complainant from entering upon the construction of said bridge during the period, in the years 1916 and 1917, when through the absence of flood waters in the Little Colorado River, said bridge could have been constructed at a minimum cost. That the expense incident thereto was not provided for in the contract hereinabove set forth, as would have been the case had complainant known that such delays would have ensued, and that by reason of such delays, through the interference of flood waters and increase in the cost of material, complainant in addition to the sum of $13,973.65 hereinabove in this complaint claimed as the actual cost of extra material, was compelled to expend and did expend the further sum of $3,216.00, the payment of which sum the complainant avers was and is justly due him, and provision for the payment thereof should have been included in the terms of the contract.

VIII.

Complainant is informed and believes, and upon such information and belief avers that defendant, acting through its officers, agents and employees, knew at the time said proposed changes were discussed, so as aforesaid embodying additional requirements as to structure imposed by the United States Government and so requiring [10] in order, as complainant avers, that defendant might have the benefit and advantage of the sum of $15,000.00 appropriated by the United States Government for the construction of said bridge that such changes and alterations would entail an expense to complainant largely in excess of the sum of $23,800.00, and under these conditions it became, was and now is the duty of the defendant, its officers, and agents, to include in the contract hereinabove set forth a clause covering such additional expenditures, in the event said claim in said contract so particularly mentioned and set forth in paragraph 11 in this bill of complaint should or could be construed by defendant, its officers, agents or employees, in a manner so as to prevent complainant from claiming compensation for such extra work under such clause. Complainant avers that if such clause does not express the intention of both parties to said contract in a manner sufficient so to do, that it was omitted therefrom at the time of the execution thereof and the performance of such labor and the furnishing of such extra material by complainant, through accident or mistake on the part of complainant, or through the intentional withholding

from complainant, on the part of defendant, its officers, agents or employees, of their construction and understanding of the meaning of such clause, and that to permit defendant, its officers, agents or employees to take advantage of their own knowledge or fraud, or the accident or mistake of complainant, was and is inequitable, and does and will work a constructive fraud and unconscionable hardship upon this complainant.

IX.

This complainant avers that on the 3d day of December, 1917, and for the reason that defendant, acting through its Board of Supervisors and said County Attorney, continued in its refusal [11] to recognize the right, claim and demand of complainants for compensation under the contract in paragraph 11 of this bill of complaint set forth, and continued in its instance that complainant was entitled to no more than $23,800.00, and that the total amount due complainant under the terms of said contract was $6204.62, they presented a demand on the County of Navajo for said amount of $6204.62 "on contract of Little Colorado River bridge, together with extras herein listed, the items of which are hereto annexed." Said extras included only labor for drilling holes, $27.14 #1958.4 reinforced steel, $127.07 and labor furnished engineer $31.40, and on said date received warrant from defendant for said sum of $6204.62.

Complainant avers that he was dissatisfied with the rejection of his claim and demand upon defendant for the amount of his contract in excess of

the sum of $6204.62, to wit, in the sum of $17,189.65, and accepted the amount so paid to them by defendant under protest and with a reservation of the right to sue for the further sum of $17,189.65, and that the balance so due the complainant as alleged and set forth in this bill of complaint was expressly and by distinct understanding between complainant and defendant through its Board of Supervisors reserved to both complainant and defendant for further discussion and such proceedings as to either complainant or defendant might be deemed necessary or advisable, and it was distinctly agreed and understood between the parties hereto that the acceptance by complainant of the warrant for $6204.62 should not be by defendant paid or by complainant received in liquidation or settlement of the amount claimed by complainant to be due under the terms of said contract.

FORASMUCH, THEREFORE, and as complainant avers that he is without plain, speedy or adequate remedy at law for the redress of [12] the wrongs and injuries complained of, and for the reason, as complainant avers, that said contract and agreement does not, under the conditions herein set forth, express the intention of both parties thereto, complainant prays the order and decree of the Honorable Court; that upon the taking of testimony herein and the ascertainment of the facts as in this complaint alleged and set forth, this Honorable Court shall make and enter its decree.

FIRST. In the event it may be ascertained by this Court that the provision contained in the con-

tract covering extras, as hereinabove in paragraph 11 of this bill of complaint set forth, shall not in effect be broad and specific enough in its terms to express the real intention of the parties, and that such failure was due to mutual mistake, that such contract be so reformed as to enable complainant thereunder to recover from defendant such sums as may be found to be justly due and owing complainant and attributable to extra labor and material performed and supplied and to loss of time, through changes made by defendant in the original specifications submitted by complainant for the construction of said bridge; or

SECOND. In the event this Honorable Court shall find from the evidence that said contract is not in its terms ambiguous, and that complainant shall be, under a strict interpretation thereof, entitled to no more than the sum of $23,800.00, that such contract be rescinded and held for naught, and that complainant do have and recover from defendant such amount, over and above the sum of $23,800.00 as to this Honorable Court may seem just and proper.

THIRD. That a writ of subpoena may be granted to complainant directed to defendant thereby requiring defendant to appear on a certain day before this Court and then and there full, true, direct and perfect answer make to all and singular the premises (but not under oath, an answer under oath being hereby expressly waived), and further to perform and abide by such further order [13]

direction or decree therefor, as to this Court may seem just and proper.

FOURTH. For such other and further relief as to this Court may seem just and proper.

(Signed) GEORGE J. STONEMAN,
Solicitor for Complainant.
406 Goodrich Bldg., Phoenix, Arizona.

[Endorsed]: Bill of Complaint. Filed May 31, 1918. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [14]

UNITED STATES OF AMERICA.

District Court of the United States, District of Arizona.

IN EQUITY.

SUBPOENA AD RESPONDENDUM.

The President of the United States, GREETING:
To Mr. Teeples, Clerk Board of Supervisors, Navajo County, Holbrook, Arizona, R. C. Creswell, Chairman Board of Supervisors Navajo County, Winslow, Arizona.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States, District of Arizona, at the courtroom in Prescott, Arizona, twenty days from the date hereof, to answer a bill of complaint exhibited against Navajo County, in said Court by Louis F. Mesmer, an individual, doing business under the name and style of Mesmer & Rice, who is a citizen of the

State of California, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, this 31st day of May, in the year of our Lord one thousand nine hundred and eighteen, and of our Independence the 142d.

[Seal] MOSE DRACHMAN,
Clerk.
By Nat. T. McKee,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the 20th day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said bill; otherwise the said bill may be taken *pro confesso.*

MOSE DRACHMAN,
Clerk.
By Nat. T. McKee,
Deputy Clerk. [15]

[Endorsed]: No. E–29 (Prescott). Mar. Docket No. 799. U. S. District Court, District of Arizona. In Equity. Louis F. Mesmer, an Individual, Doing Business Under the Name and Style of Mesmer & Rice, vs. Navajo County. Subpoena Ad Respondendum. (Stamped:) Filed Jun. 28, 1918. Mose Drachman, Clerk. By Nat. T. McKee, Deputy.

UNITED STATES MARSHAL'S RETURN.

I received this writ at Phoenix, Arizona, June 1, 1918, and executed the same June 26, 1918, at Phoenix, Arizona, by placing in the United States postoffice at Phoenix, Arizona, two separate packages, to be sent by registered mail, by the Postoffice Department, addressed to R. C. Creswell, Chairman, Board of Supervisors of Navajo County, at Winslow, Arizona, and R. S. Teeple, Clerk, Board of Supervisors of Navajo County, at Holbrook, Arizona, each of which packages contained a copy of Subpoena ad respondendum, to which was attached a copy of the bill of complaint in the case of Louis F. Mesmer, an individual doing business under the name and style of Mesmer & Rice, vs. Navajo County, Arizona, said case being numbered E–29 (Prescott) and said writ having been issued out of the United States District Court, at Phoenix, Arizona, by Mose Drachman, Clerk of said Court, on the 31st day of May, 1918.

This method of service was followed by instruction of Hon. Geo. J. Stoneman, Attorney of Record for the plaintiff herein. His letter of instruction is hereto attached together with return Registry Receipts from R. C. Creswell and R. S. Teeple.

This writ is returned to the Clerk of the court at Phoenix, Arizona, this 28th day of June, 1918.

J. P. DILLON,
U. S. Marshal.
By D. N. Willits,
Chief Deputy. [16]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

IN LAW—No. 56.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

COMPLAINT.

Comes now Louis F. Mesmer, an individual, doing business under the name and style of Mesmer & Rice, leave of Court to file a complaint on the law side of this court in lieu of bill in equity heretofore filed having been first had and obtained, and complaining of Navajo County, defendant above named, for cause of action alleges:

I.

That the plaintiff now is and at all times hereinafter mentioned has been a citizen of the United States and an inhabitant and resident of the southern district of California; and that defendant, Navajo County, is a political subdivision of the State of Arizona, and is included within the Prescott Division of the District Court of the United States, for the District of Arizona.

II.

That the amount in controversy in this suit ex-

ceeds the sum of three thousand dollars, exclusive of interest and costs, and that the jurisdiction of this Honorable Court depends upon diversity of citizenship of plaintiff and defendant.

That on the 5th day of September, 1916, and for a [17] long time prior thereto, this plaitiff under the name and style of Mesmer & Rice, was a contractor engaged in the business of erecting bridges, and in response to an invitation and call for bids prior to the 5th day of September, 1916, advertised by defendant for the construction of certain bridges for which appropriations had been theretofore made by defendant, plaintiff submitted to defendant his bid for the construction of certain bridges to be erected by the defendant and particularly for that certain bridge to be erected by defendant across the Little Colorado River near Winslow, Arizona, hereinafter referred to as Contract #1, Bridge T–3, and that said bid was accompanied by specifications prepared by plaintiffs and a proposal to erect and construct said Bridge T–3 for certain sums, dependent upon the design and construction desired by defendant, among which specifications was a proposal to construct said bridge according to specifications therewith submitted for the sum of $23,800.00. Said proposal contained a provision designed by the plaintiff and intended by plaintiff to be understood by defendant to cover extras and additional quantities of material which might be by defendant required or designated to be used, which provision is in words and figures as follows, to wit:

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place ...$20.00 per yd.
(b) Additional structural steel in place ..... 7.5¢ per lb.
(c) Additional reinforcing steel, in place .....7¢ per lb.
(d) All other work will be done on the percentage basis at actual cost plus 15%.

That said proposal containing the provision hereinabove set forth and referred to was in words and figures as follows, to wit: [18]

"We, the undersigned, hereby propose to furnish all materials and all labor, necessary and requisite to perform and complete in a first class and workmanlike manner the construction of the seven new steel bridges to be built in Navajo County, Arizona, as per General Specifications prepared by Mr. Charles E. Perkins, County Engineer, Holbrook, Arizona, and per specifications and drawings submitted herewith for the following prices for each bridge separately:

Contract #1, Bridge T–3, over Little Colorado River near Winslow as shown on drawing #4183, with 14′ Roadway concrete floor, steel joists, steel railing, resting on steel concrete pier, with number of trusses as shown, with all field connection riveted, all for the sum of.....$31,242.00

(a) REGULAR DESIGN, with three spans as described above.

(b) Same as (a) except with wood floor and steel joists for 23,800.00

(c) Same as (a) except with wood floor and wood joists for 22,050.00

(d) Same as (a) except with 12′ roadway for 28,894.00

(e) Same as (d) except with wood floor and steel joists for 21,610.00

(f) Same as (d) except for wood floor and wood joists for 20,170.00

(aa) ALTERNATE DESIGN, as described under (a) except five spans 25,290.00

(bb) Same as (aa) except with wood floor and steel joists for 19,000.00

(cc) Same as (aa) except with wood floor and wood joists for 17,200.00

(dd) Same as (aa) except with 12′ wood floor roadway for 24,520.00

(ee) Same as (dd) except with wood floor and steel joists for 18,400.00

(ff) Same as (dd) except with wood floor and wood joists for 17,030.00

(g) For wood railing instead steel railing deduct..... 500.00

(b) For bolting field connections instead of riveting deduct 250.00

(j) For concrete web between steel cylinders, add..... 25.00 per yd.

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place.....20.00 per yd.

(b) Additional structural steel in place ..... 7.5¢ per lb.

(c) Additional reinforcing steel in place ..... 7 ¢ per lb.

(d) All other work will be done on the percentage basis at actual cost plus 15%.

All the above proposals, while bid on separately, are for all seven bridges and cannot be accepted for any one bridge. If, however, we are low bidder on 75% or 80% of the work, we will entertain a proposition from your Honorable Board, but it is our intention to do all of the work and we have bid accordingly.

Respectfully submitted,

MESMER & RICE.

By LOUIS F. MESMER.

Holbrook, Arizona, July 1st, 1916." [19]

III.

That on the 7th day of August, 1916, the Board of supervisors of Navajo County, defendant above named, having regularly convened for the purpose of acting upon the proposals and specifications submitted by plaintiff for the erection of the bridge mentioned, made and entered its order that the bid of plaintiff submitted under the firm name of Mesmer & Rice, of Los Angeles, California, being the lowest and best bid received for the construction of the bridge across the Little Colorado River, near Winslow, at a cost of $23,800.00, the same was accepted and approved subject to approval of contract, specifications and plans therefor by the United States Indian Department, which Department was to pay one-half the cost of the construction of said bridge; and that thereafter, pursuant to said order, entered into a contract and agreement with plaintiff, under and by the terms of which plaintiff was authorized to enter upon the construction of said bridge T–3, for the sum of $23,800.00; and in addition thereto it was provided by the terms of said contract that the extra sub-structure of said bridge was to be paid for "as per *addenda* for extras upon the proposal accepted."

Such contract is in words and figures as follows, to wit:

"This agreement, made and entered into this 5th day of September, A. D. 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part, and Louis

F. Mesmer, doing business under the name of Mesmer & Rice, of Los Angeles, California, the party of the second part,

WHEREAS the party of the first part hertofore advertised for bids for the construction and building of certain bridges and,

WHEREAS said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the 3d day of July, A. D. 1916, for the constructing and building of the bridge hereinafter mentioned, and

WHEREAS the party of the second part submitted bid for construction and building said bridge, and

WHEREAS the said bid of the party of the second [20] part appears to be the lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and

WHEREAS, for the purpose of identification and to set forth more fully the provisions and stipulations of this contract, said call for bids with specifications for such bridge is hereto attached and made a part hereof, and

WHEREAS, for the same purposes the said bids are hereto attached, and made a part hereof, and

WHEREAS the said party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described, for the sum of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars,

NOW, THEREFORE, the said party of the second part has agreed and by these presents does agree to and with the party of the first part, for and in consideration of twenty-three thousand eight hundred and no/100 ($23,800) dollars, to furnish all the materials and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications designated and attached hereto and made a part hereof, to construct and erect the following bridge, to wit:

Bridge T–3, over Little Colorado River, east of Winslow.

Superstructure: 3–165′, riveted H. T. steel spans as per superstructure plan on drawing No. 4183; superstructure to be as follows (as per *addenda* for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8′ in diam., filled with a rich concrete resting upon twelve piles driven to a refusal of a fifteen tons load each; the upper steel cylinder be fifteen feet in length or such that its upper end will be level with a point two feet above the bottom chord of the adjoining A. T. & S. F. R. R. Bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be 6 ft. in diam. and filled with a rich concrete mixture connected with the lower concrete by 12 1″ twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18″ reinforced concrete wall of an equal length with the said upper cylinders and abutments to consist of two thirty foot steel cylinders each, six feet in

diam., filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall.

It is further agreed that in the event of any changes being made by the party of the first part, or any extras required by the party of the first part, such charges of extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore [21] described, according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party of the second part, in constructing said bridge in accordance with Clause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part, at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the aforesaid bridge shall be made imme-

diately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law ~~except part to be paid by U. S. Government is to be paid according to custom of Indian Department in contracts of this kind as regards time of payment.~~

R. C. C.
Geo. W. H.
Q. R. G.

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

It is also stipulated that as evidence of good faith in the performance of this contract, the said Louis F. Mesmer will furnish and give to the party of the first part good and sufficient bond in the penal sum of six thousand dollars.

The party of the second part shall provide sufficient safe and proper facilities at all times for the inspection of the work by the party of the first part, or its agent, and shall within twenty-four hours after receiving written notice from the party of the first part, or its agent, to that effect, proceed to remove from the grounds all materials which may be condemned, whether worked or unworked, and to tear down all portions of the work which may be condemned by the party of the first part or its agent, as unsound or improper, or in any way failing to conform to the plans and specifications hereinbefore mentioned, and it is understood that the party of the first part will at all times have an inspector present during the progress of the work

on the bridge hereinbefore mentioned, and if not, this clause in this contract is null and void.

Should the party of the second part be obstructed or delayed in the prosecution or completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The party of the second part agrees and stipulates that if he shall delay the material progress of the work so as to cause any damage for which the party of the first [22] part may become liable, or perform any other act for which the party of the first part may become liable, then and in that event the party of the second part shall make good to the party of the first part any such damage.

If at any time there shall be evidence of any lien or claim for which, if established, the party of the first part might become liable, and which is chargeable to the party of the second part, the party of the first part shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to indemnify it against such lien and claim, and should there prove to be any such claim, after all payments are made, the party of the second part shall refund to the party of the first part all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the default of the party of the second part.

It is further mutually agreed by and between the parties hereto that no certificate given nor payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed as an acceptance of defective work or improper materials.

It is also understood and agreed that A & B company Standard Specifications for highway bridges have been and are hereby adopted as the general reference for the construction of the bridge mentioned herein.

~~It is also hereby stipulated that the plans, specifications~~ and form of contract for the building of the bridge hereinbefore specified, are subject to the approval of the United States Indian Department, and that this contract is not fully binding until the Congressional appropriation of fifteen thousand and no/100 ($15,000.00) dollars for said bridge is available for use ~~in the construction of said bridge.~~

R. C. C.
Geo. W. H.
Q. R. G.

The said parties for themselves, their successors and assigns, heirs, administrators and executors, do hereby agree to the full performance of the covenants herein contained, and conform to the specifications and plans hereto annexed and made a part hereof, except where either of same may be changed in accordance with the provisions hereinbefore mentioned.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands the day and year first above written.

NAVAJO COUNTY,
By R. C. CRESWELL,
Chairman,
GEO. W. HENNESSEY,
Member,
Q. R. GARDNER,
Member,
Board of Supervisors.

[Seal] Attest: DEE M. MOSS,
Clerk, Board of Supervisors.

LOUIS F. MESMER,
Doing Business Under the Name of Mesmer & Rice." [23]

IV.

Plaintiff alleges that under the terms of said contract he entered upon the construction of said bridge, but that thereafter, and from time to time during the performance of labor by plaintiff in the construction of said bridge, defendant through its officers and agents, proposed to and required of plaintiff that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by plaintiff in the original specifications, proposal or contract, except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule to be charges for extras, as set forth in said proposal, contract and specifications.

V.

That on the 9th day of August, 1916, and after the original proposal, plans and specifications for the erection of said bridge had been submitted by plaintiff and accepted by defendant, said defendant was advised that through an appropriation by the United States Government to be disbursed through the Commissioner of Indian Affairs, there would be available for the construction of said bridge, and in addition to the sum appropriated by defendant, the sum of $15,000.00. This sum was, however, available upon condition, as plaintiff is advised, that the original plans and specifications so submitted by plaintiff should be changed and altered in a manner so as to permit the construction of a stronger structure, and in a manner to be approved by the Commissioner of Indian Affairs. That it was not, however, at this time known, either to plaintiff or to defendant, the exact nature of such changes nor the expense which would be incident thereto, for which reason, plaintiff alleges, it was agreed (or should have [24] been agreed) between plaintiff and defendant, that such changes as were, for this reason, required to be made, should be paid for as extras, according to the price and terms of that portion of complainant's contract hereinabove in paragraph II of this complaint particularly referred to and set forth, and plaintiff, relying upon this understanding and agreement so had with defendant, completed said bridge in compliance, in all respects, with his con-

tract and agreement, at an expense to him, over and above the original contract price of $23,800.00, of the sum of $13,973.65, which sum, plaintiff alleges, became and was a necessary expenditure by reason of the changes directed by defendant as aforesaid, in the construction of said bridge with superstructure and approaches.

VI.

That upon the completion of said bridge by plaintiff, on or about the 3d day of December, 1917, plaintiff presented to defendant, through its Board of Supervisors, statement of the amount due him on account of labor and materials performed and supplied for the construction of said bridge under the conditions hereinabove set forth, showing a balance due from defendant to plaintiff of the sum of $13,973.65. That on said date defendant, through its Board of Supervisors, rejected the claim of plaintiff so presented and refused and still does refuse to pay the said sum of $13,973.65, or any part thereof.

VII.

Plaintiff alleges that subsequent to the 9th day of August, 1916, defendant, its officers and agents, entered into a series of conferences with representatives of the Indian Department of the United States Government for the purpose of determining what changes and alterations from the [25] original plans and specifications submitted by plaintiff would be made necessary so as to meet the requirements of the Indian Department and permit de-

fendent to avail itself of the $15,000.00 so as in this complaint alleged, appropriated by said Indian Department. That by reason of such acts on the part of defendant, its officers and agents, plaintiff was prevented from entering upon the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original specifications, and was delayed in the commencement of said work during the year 1916 and subsequent to the 9th day of August, until the year 1917; that such delay ensuing and so caused, as aforesaid, was without the fault of plaintiff and resulted in preventing plaintiff from entering upon the construction of said bridge during the period, in the years 1916 and 1917, when through the absence of flood waters in the Little Colorado River, said bridge could have been constructed at a minimum cost. That the expense incident thereto was not provided for in the contract hereinabove set forth, as would have been the case had plaintiff known that such delays would have ensued, and that by reason of such delays, through the interference of flood waters and increase in the cost of material, plaintiff, in addition to the sum of $13,973.65, hereinabove in this complaint claimed as the actual cost of extra material, was compelled to expend and did expend the further sum of $3,216.00, the payment of which sum plaintiff alleges was and now is justly due him from defendant.

VIII.

That on the 3d day of December, 1917, plaintiff

accepted from defendant the sum of $6,204.62 on account of the amount so due him as aforesaid. That said sum was accepted by plaintiff under protest, and with the knowledge [26] on the part of defendant that plaintiff was dissatisfied with such amount, and with the reservation on the part of plaintiff of his right to sue for the further sum of $17,189.65, being the balance due him under and by the terms of said contract. That said sum of $6,204.62 was paid by defendant to plaintiff on account of his contract on Little Colorado River bridge, together with extras therein listed, the items of which were at the time of the allowance of said sum annexed to the claim and voucher therefor. That it was understood and agreed between plaintiff and defendant that the acceptance by plaintiff of the warrant for such sum of $6,204.62 should not be by defendant paid or by plaintiff received in liquidation or settlement of the amount claimed to be due him under the terms of his said contract.

X.

Plaintiff alleges that there is now due and owing to him from defendant on account of said contract the sum of $17,189.65, with legal interest thereon from the 3d day of December, 1917.

WHEREFORE plaintiff prays judgment against defendant in the sum of $17,189.65, together with interest as herein stated, and for costs of suit.

GEORGE J. STONEMAN,
Attorney for Plaintiff,
406 Goodrich Blk., Phoenix, Ariz.

[Endorsed]: Complaint. Filed Dec. 2d, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [27]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

IN LAW—No. 56.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

ANSWER.

Comes now the above-named defendant, Navajo County, by its attorneys, the County Attorney of Navajo County, C. H. Jordan, and Clark & Clark, and files the following Motion, Plea and Answer to plaintiff's complaint herein.

I.

MOTION TO STRIKE.

1. Defendant moves the Court to strike from the record the entire complaint of plaintiff and to dismiss said complaint, for the reason that said complaint does not state facts sufficient to constitute any ground of action against this defendant.

2. Without waiving said motion to strike, but expressly reserving and relying upon the same,

this defendant, in case said motion should be denied, moves the Court to strike from said complaint the following language occurring in Paragraph III in said bill of complaint, to wit:

> "and in addition thereto it was provided by the terms of said contract that the extra substructure of said bridge was to be paid for 'as per *addenda*' for extras upon the proposal accepted."

for the reason that said words and language are irrelevant, redundant, [28] frivolous and immaterial and are shown in the contract, a copy of which is included in said bill of complaint, to have no foundation in said contract.

3. Defendant further moves that the following words and language occurring in Paragrph IV of said complaint be stricken therefrom, to wit:

> "and from time to time during the performance of labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to and required of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras, as set forth in said proposal, contract and specifications,"

for the reason that said words and language are irrelevant, redundant, superfluous and immaterial, and appear by reference to the remainder of said complaint to have no foundation therein or in the said contract.

4. Defendant further moves that all of the allegations contained in Paragraph V of said complaint be stricken from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevant, redundant and frivolous.

5. Defendant further moves that all of the allegations of Paragraph VI of said complaint be stricken from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevant, redundant and frivolous.

6. Defendant further moves that all of the allegations of Paragraph VII of said complaint be stricken from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevant, redundant and frivolous.

7. Defendant further moves that all of the allegations contained in Paragraph VIII of said complaint be stricken [29] from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevent, redundant and frivolous.

C. H. JORDAN,
E. S. CLARK,
Attorneys for Defendant.

II.

PLEA IN BAR.

Further answering said complaint, by way of plea in bar, defendant alleges that it apears on the face

of said complaint, and is a fact, that plaintiff's alleged cause of action, and each and every part thereof, accrued more than six months prior to the bringing and commencement of this action, for the reason that plaintiff's alleged claim against the defendant, Navajo County, for the sum of Fifteen Thousand and Forty ($15,040.00) Dollars, was filed with and presented to the Board of Supervisors of said Navajo County, on or before the first day of October, 1917; that on said first day of October, 1917, the said Board of Supervisors, being then regularly in session, deferred action upon said demand until the fifth day of November, 1917; that upon said last-mentioned date, the said Board of Supervisors being then regularly in session took said demand under consideration, and after fully considering the same, rejected the said demand and all thereof; that at the same time another demand against said county in the sum of Seventeen Thousand Seven Hundred and Seventy-Six ($17,776.00) Dollars was presented to said Board of Supervisors, and was thereupon by said Board considered, rejected and disallowed; that both of said demands purported to be the demands of the plaintiff against said defendant for the construction of the bridge mentioned and described in plaintiff's complaint, and for labor and material [30] incident to said construction. That pursuant to the provisions of Paragraph 2439 of the Revised Statutes of Arizona for the year 1913, said alleged cause of action of plaintiff, and all thereof, is barred by limitation, inasmuch as plain-

tiff wholly failed and neglected to sue the defendant upon said claim within six months after final action had been taken by said Board of Supervisors, as above set forth. That this action was not filed until on or about the 2d day of December, 1919.

Further answering said complaint, by way of plea in bar, defendant alleges: That on the 3d day of December, 1917, complainant presented a duly verified demand against defendant for the sum of Six Thousand Two Hundred Four Dollars and Sixty-two Cents ($6,204.62), which demand is in the words and figures following, to wit:

"Holbrook, Arizona, Dec. 3, 1917.

Mesmer & Rice present this demand on the County of Navajo for the sum of Sixty-two hundred & four and 62/100 Dollars, balance due to complete the amount of $23,800.00 on contract of Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

Items of the Foregoing Demand.

Contract price	$23,800.00	
Labor drilling holes	27.14	
1958.4# reinforcing steel ...	137.08	
Labor furnished engineer ...	31.40	
		23995.62
Less.		
Previous payments	17,600.00	
Rent of cement mixer	176.00	
Repairs of cement mixer	15.00	
		6204.62

"Note: This demand must be signed and sworn to before some officer authorized to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do hereby solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that every particular, unto annexed are true and correct in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

LOUIS F. MESMER. [31]

Sworn to and subscribed before me Dec. 3d, 1917.

R. S. TEEPLE,
Clerk Board of Supervisors,
Notary Public.

My commission expires ——.

DISTRIBUTION.

Demand No. 1.

Warrant No. 426.

Filed Dec. 3d, 1917. R. S. Teeple, Clerk. Board of Supervisors.

Approved and ordered paid for $6204.62. Wi-Colo Bridge fund Dec. 3d, 1917.

R. C. CRESWELL,
Chairman, Board of Supervisors."

Defendant further alleges that on the same date the defendant issued its warrant to complainant

for the sum of Sixty-two Hundred Four Dollars and Sixty-two Cents in full and unconditional payment of said demand, which said warrant was thereafter presented by complainant to the County Treasurer of Navajo County and by him paid in full, on the 30th day of March, 1918; that said warrant was issued by defendant and accepted by complainant as in full and complete payment, satisfaction and discharge of all demands of every kind and character of complainant against defendant pertaining to, connected with, or arising out of the construction of said bridge pursuant to said contract, as well as for all extras, additions and modifications claimed by or due to the complainant in connection with or arising out of said construction; that said sum of Sixty-two Hundred Four Dollars and Sixty-two Cents constituted the full and entire balance then due or ever to become due to complainant for said construction or in connection therewith or incidental thereto; that by reason of the premises, the complainant has been fully paid and satisfied for said construction, together with all additions and modifications. Defendant denies that said warrant was ever accepted by complainant under protest [32] and with a reservation of a right to sue for a further sum of Seventeen Thousand One Hundred Eighty-nine Dollars and Sixty-five Cents ($17,189.65), and denies that it was accepted subject to any condition or reservation whatsoever, but defendant alleges, on the contrary, that it was accepted as in full, final and complete payment for all work and material

performed or used in connection with the construction of said bridge; defendant specifically denies that at the time said warrant was issued there was any agreement or understanding between the parties hereto other than that said warrant was issued by defendant and accepted by complainant as in full, final and complete settlement of all demands of every kind and nature of the complainant against the defendant.

WHEREFORE, defendant prays judgment that plaintiff's said cause of action be barred; that plaintiff take nothing by his said action, and that defendant recover its costs herein expended.

E. S. CLARK,
C. H. JORDAN. [33]

III.

ANSWER.

Comes now the defendant above named and answers plaintiff's complaint on file herein as follows:

1. Defendant denies that any contract was ever entered into between plaintiff and defendant for the construction of a bridge across the Little Colorado River which was subject to the approval as to contract, specifications and plans of the United States Indian Department, but alleges, on the contrary, that all such matter as would tend to render said contract, plans or specifications subject to the approval of the United States Indian Department was eliminated from the contract at the special instance and request of the plaintiff himself, and that the alleged copy of said contract appearing in said complaint, in so far as it pur-

ports to set forth a stipulation that the plans, specifications and form of contract were subject to the approval of the United States Indian Department, is erroneous, and not supported by said original contract, as signed by the parties hereto. Defendant denies that at the time said contract of September 5th, 1916, was entered into between the parties hereto, the exact nature of changes requested by the Commissioner of Indian Affairs was uncertain or unknown, and denies that the expense, if any, incident to such changes was unknown, but alleges, on the contrary, that at the time said contract was made on said last-mentioned date the request, if any, made by the said Commissioner of Indian Affairs were definitely ascertained and understood by both the plaintiff and defendant, and that there was no misunderstanding, uncertainty or ambiguity as to what would be required of plaintiff under said contract at the time it was made, and that the plaintiff entered upon the performance of said contract with definite and exact knowledge of each and every [34] requirement pertaining to said construction. Defendant further denies that it ever directed any such changes in or departure from the original contract for the construction of said bridge as imposed upon the plaintiff any expense over and above the original contract price, and denies that any changes were made in said contract that imposed upon plaintiff an additional expense of Thirteen Thousand Nine Hundred Seventy-three Dollars and Sixty-five Cents or any other sum, or any additional expense whatsoever.

2. Defendant further denies that plaintiff was ever prevented by its act, order or request, or by the act, order or request of any officer or agent authorized to speak or act for the defendant, from entering upon the construction of said bridge, and denies that it ever directly or through any authorized officer or agent prevented, delayed or interfered with the plaintiff in ordering material, supplies and equipment contemplated in the original specifications of said contract, and denies that the plaintiff was ever delayed in the commencement of said work during the year 1916 or at any time, and denies that plaintiff was delayed at all by or on account of any act or omission of defendant, but alleges, on the contrary, that if any delay occurred in the commencement of the work upon said bridge or the prosecution thereof, it was due wholly and entirely to the negligence and omissions of the plaintiff himself, and that if any cost or expense has been occasioned by delay in the commencement by plaintiff of said work, or in the prosecution thereof, it is due entirely and exclusively to the procrastination and dilatory methods of plaintiff and not to any act, direction, request or omission of the defendant.

3. Defendant further alleges that plaintiff is not entitled under said contract to any compensation, bonus or excess over and above the said contract price of Twenty-three Thousand Eight Hundred ($23,800.00) Dollars, on account of any [35] alleged delay in the commencement or prosecution of the construction of said bridge for the reason

that it is expressly provided in the contract set forth in plaintiff's complaint, that:

> "Should the party of the second part be obstructed or delayed in the prosecution or completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work, shall be extended for a period equivalent to the time lost by reason of one or more of the causes aforesaid."

That the party of the second part took and was given as much time beyond the contract period of six months from the date of the contract as he desired, all of which excess time was due not to any act, mistake, default of omission on the part of the party of the first part, but was wholly due to the dilatory methods, procrastination and lack of diligence on the part of the party of the second part.

Defendant denies that plaintiff ever expended the sum of Three Thousand Two Hundred and Sixteen ($3,216.00) Dollars on account of delay, as set forth in Paragraph VII of his complaint, and denies that he expended any sum whatever for cost of extra material by reason of any act, omission, mistake or direction of the defendant.

4. Defendant alleges that on the 3d day of December, 1917, complainant presented a duly verified demand against defendant for the sum of Six Thousand Two Hundred Four Dollars and Sixty-two Cents ($6,204.62), which demand is in the words and figures following, to wit:

"Holbrook, Arizona, Dec. 3, 1917.

Mesmer & Rice present this demand on the County of Navajo for the sum of Sixty-two Hundred & four and 62/100 Dollars, balance due to complete the amount of $23,800.00 on contract of Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

Items of the Foregoing Demand.

Contract price	$23,800.00	
Labor drilling holes	27.14	
1958.4# reinforcing steel ...	137.08	
Labor furnished engineer ...	31.40	
		23995.62
Less. [36]		
Previous payments	17,600.00	
Rent of cement mixer	176.00	
Repairs of cement mixer	15.00	
		6204.62

Note: This demand must be signed and sworn to before some officer authorized to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do hereby solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct

in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

LOUIS F. MESMER.

Sworn to and subscribed before me Dec. 3d, 1917.

R. S. TEEPLE,
Clerk of the Board of Supervisors,
Notary Public.

My commission expires ———.

DISTRIBUTION.

Filed Dec. 3d, 1917, R. S.Teeple, Clerk, Board of Supervisors.

Approved and ordered paid for $6204.62 Wi-Colo Bridge fund Dec. 3d, 1917.

R. S. CRESWELL,
Chairman, Board of Supervisors."

Defendant further alleges that on the same date the defendant issued its warrant to plaintiff for the sum of Sixty-two Hundred and Four Dollars and Sixty-two Cents in full and unconditional payment of said demand, which said warrant was thereafter presented by plaintiff to the County Treasurer of Navajo County, and by him paid in full, on the 30th day of March, 1918; that said warrant was issued by defendant and accepted by plaintiff as in full and complete payment, satisfaction and discharge of all demands of every kind and character of plaintiff against defendant pertaining to, connected with, or arising out of the construction of said bridge pursuant to said contract, as well as for all extras, additions and modifications

claimed by or due to the plaintiff in connection with or arising out of said construction; that said sum of Sixty-two Hundred Four Dollars [37] and Sixty-two Cents constituted the full and entire balance then due or ever to become due to plaintiff for said construction or in connection therewith or incidental thereto; that by reason of the premises, the plaintiff has been fully paid and satisfied for said construction, together with all additions and modifications. Defendant denies that said warrant was ever accepted by plaintiff under protest and with a reservation of a right to sue for a further sum of Seventeen Thousand One Hundred Eighty-nine Dollars and Sixty-five Cents ($17,129.65), and denies that it was accepted subject to any condition or reservation whatsoever, but defendant alleges, on the contrary, that it was accepted as in full, final and complete payment for all work and material performed or used in connection with the construction of said bridge. Defendant specifically denies that at the time said warrant was issued there was any agreement or understanding between the parties hereto other than that said warrant was issued by defendant and accepted by plaintiff as in full, final and complete settlement of all demands of every kind and nature of the plaintiff against the defendant.

4. Defendant denies that it is indebted to plaintiff in any sum whatsoever, and denies that it is in debted to plaintiff at all. Defendant further denies each and every, all and singular, the allegations of

plaintiff's complaint, except as such allegations may be herein admitted, modified or qualified.

WHEREFORE, having fully answered, defendant prays that plaintiff take nothing by his said action, and that defendant recover its costs herein.

E. S. CLARK,
C. H. JORDAN,
Attorneys for Defendant.

[Endorsed]: Answer. Filed March 8, 1920. C. R. McFall, Clerk. [38]

Regular March, 1920, Term, at Prescott.

In the United States District Court, in and for the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of March 22d, 1920.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 22, 1920—ORDER RE DEMURRER.

The matter of the defendant's motion to strike heretofore filed herein coming on regularly for

hearing this day, comes now E. S. Clark, Esq., on behalf of the defendant, and George J. Stoneman, Esq., on behalf of the plaintiff:

IT IS ORDERED by the Court that the defendant later during the day be permitted to file herein a special demurrer setting up the Statute of Limitations in bar of this action, and that the same be now considered by the Court, as filed, and the Court, having heard arguments of counsel concerning said special demurrer, now orders the same overruled. (To which ruling of the Court, the defendant in open court, then and there duly excepted.)

Further argument was then had by counsel upon defendant's motion to strike, and it was ordered by the Court that the words "or should have been agreed" found in line 32 on page 8 of the complaint herein, be stricken out; the remaining grounds of said motion to strike were submitted to the Court and by the Court taken under advisement.

IT IS FURTHER ORDERED by the Court that the defendant be permitted to file herein an additional demurrer, and a motion to make more definite and certain. [39]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

DEMURRER.

Comes now the defendant herein, and by leave of Court first had and obtained, demurs to the plaintiff's complaint on file herein upon the following grounds:

I.

Defendant demurs to the cause of action attempted to be set forth in Paragraphs V and VI of plaintiff's complaint, for the reason, that the allegations thereof do not state facts sufficient to constitute any cause of action against defendant.

II.

Defendant demurs to the cause of action attempted to be set forth in Paragraph IV of plaintiff's complaint, for the reason that the allegations of said paragraph do not state facts sufficient to constitute any cause of action whatsoever against defendant.

III.

Defendant demurs to the plaintiff's complaint

upon the ground, that it appears upon the face thereof, that the cause of action attempted to be set forth therein, accrued on the fifth day of November, 1917, and that this action was not brought until more than six (6) months thereafter, and by reason of the premises, plaintiff's alleged cause of action is barred by limitations. [40]

IV.

Defendant demurs to plaintiff's complaint as a whole, for the reason that said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and the several causes of action attempted to be set forth therein, and for its costs.

E. S. CLARK,
C. H. JORDAN,
Attorneys for Defendant.

[Endorsed]: Demurrer. Filed March 23, 1920. C. R. McFall, Clerk. [41]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

No. L–56—PRCT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

MOTION TO MAKE MORE DEFINITE AND CERTAIN.

Comes now the defendant above named, and respectfully moves the Court to require the plaintiff to make his complaint more definite and certain in the following particulars, to wit:

I.

That plaintiff make the allegations of Paragraph IV more definite and certain by stating what officers and agents of defendant, if any, proposed to, and required of the plaintiff that certain changes and alterations be made in the original specifications; when such changes and alterations were required, and what said changes and alterations consisted of.

II.

That plaintiff make the allegations of Paragraph V more definite and certain by stating when it was agreed between plaintiff and defendant that the original plans and specifications should be changed and altered in the manner so as to permit the construction of a stronger structure, and whether such change was directed in writing, and what such change or alterations consisted of; that plaintiff also be required to state the items of expense he incurred in making up the sum of Thirteen Thousand Nine Hundred and Seventy-three and 65/100 Dollars, ($13,973.65), which he claims in said Paragraph V to have expended over and above the contract price of Twenty-three Thousand Eight Hundred Dollars ($23,800.00) by reason of changes di-

rected by the defendant in the construction of the bridge. [42]

III.

That plaintiff be required to make the allegations of Paragraph VI of his complaint more definite and certain by setting forth a copy of the demand, or statement, alleged in said paragraph to have been presented to defendant on or about the third day of December, 1917, for the sum of Thirteen Thousand Nine Hundred Seventy-three and 65/100 Dollars ($13,973.65).

IV.

That plaintiff make the allegations of Paragraph VII more definite and certain by stating by what officer of the defendant, he was prevented from entering on the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original plans and specifications; whether such direction was oral or in writing and when such direction was given, how long, if at all, plaintiff was delayed by such instructions in commencing work upon said bridge.

V.

That plaintiff make the allegations of Paragraph VIII of his complaint more definite and certain, by stating whether he filed a demand in writing and under oath, against the defendant, for the sum of Six Thousand Two Hundred and Four and 62/100 Dollars ($6,204.62), alleged by him to have been accepted from the defendant on the third day of

December, 1917, and that he set forth a copy of said demand.

E. S. CLARK.
C. H. JORDAN.

[Endorsed]: Motion to Make More Definite and Certain. Filed: March 23, 1920. C. R. McFall, Clerk. [43]

Regular November Term, 1921, at Tucson.

In the United States District Court in and for the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of Saturday, April 24th, 1922.)

No. L–56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—APRIL 24, 1922—ORDER RE MOTION TO MAKE MORE DEFINITE AND CERTAIN.

The defendant's motion to strike herein, upon consideration thereof, IT IS ORDERED that it be and hereby is overruled.

IT IS FURTHER ORDERED that the first, second and fourth grounds of the defendant's motion to make more definite and certain be and they are hereby sustained; and that the third and fifth grounds of said motion be and they are hereby overruled.

IT IS ORDERED that the demurrer herein be passed because of the ruling of the Court sustaining certain of the defendant's motions to make more definite and certain.

IT IS FURTHER ORDERED that the plaintiff herein be given ten days from receipt of notice of this order to amend his complaint, and the defendant is given ten days from the receipt of notice of the filing of said amended complaint, to answer thereto. [44]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

No. 56—IN LAW.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of Mesmer & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

AMENDED COMPLAINT.

Comes now Louis F. Mesmer, an individual, doing

business under the name and style of Mesmer & Rice, leave of Court being first had and obtained, and files this his amended complaint, and complaining of Navajo County, defendant above named, for cause of action alleges:

I.

That the plaintiff now is and at all times hereinafter mentioned has been a citizen of the United States and an inhabitant and resident and citizen of the southern district of California; and that defendant, Navajo County, is a political subdivision of the State of Arizona, and is included within the Prescott Division of the District Court of the United States, for the District of Arizona.

II.

That the amount in controversy in this suit exceeds the sum of three thousand dollars, exclusive of interest and costs, and that the jurisdiction of this Honorable Court depends upon diversity of citizenship of plaintiff and defendant.

That on the 5th day of September, 1916, and for a long time prior thereto, this plaintiff under the name and style of [45] Mesmer & Rice, was a contractor engaged in the business of erecting bridges, and in response to an invitation and call for bids prior to the 5th day of September, 1916, advertised by defendant for the construction of certain bridges for which appropriations had been theretofore made by defendant, plaintiff submitted to defendant his bid for the construction of certain bridges to be erected by the defendant and particularly for that certain bridge to be erected by de-

fendant across the Little Colorado River near Winslow, Arizona, hereinafter referred to as Contract #1, Bridge T–3, and that said bid was accompanied by specifications prepared by plaintiffs and a proposal to erect and construct said bridge T–3 for certain sums, dependent upon the design and construction desired by defendant, among which specifications was a proposal to construct said bridge according to specifications therewith submitted for the sum of $23,800.00 Said proposal contained a provision designed by the plaintiff and intended by plaintiff to be understood by defendant to cover extras and additional quantities of material which might be by defendant required or designated to be used, which provision is in words and figures as follows, to wit:

"If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place...$20.00 per yd.
(b) Additional structural steel in place ..... 7.5¢ " lb.
(c) Additional reinforcing steel in place ..... 7 ¢
(d) All other work will be done on the percentage basis at actual cost plus 15%.

That said proposal containing the provision hereinabove set forth and referred to was in words and figures as follows, to wit:

"We, the undersigned, hereby propose to furnish all materials and all labor, necessary and requisite to perform and complete in a first-class and workmanlike manner the construction of the seven new steel bridges to be built in Navajo County, Arizona, as per General Specifications [46] prepared by Mr. Charles E. Perkins, County Engineer, Holbrook, Arizona, and per specifications and drawings submitted herewith for the following prices for each bridge separately:

Contract #1, Bridge T–3, over Little Colorado River near Winslow as shown on drawing #4183, with 14′ Roadway concrete floor, steel joists, steel railing, resting on steel concrete pier, with number of trusses as shown, with all field connection riveted, all for the sum of.....$ 31,242.00

(a) Regular Design, with three spans as described above

(b) Same as (a) except with wood floor and steel joists, for..... 23,800.00

(c) Same as (a) except with wood floor and wood joists for..... 22,050.00

(d) Same as (a) except with 12′ roadway for..... 28,894.00

(e) Same as (d) except with wood floor and steel joists for..... 21,610.00

(f) Same as (d) except with wood floor and wood joists for..... 20,170.00

(aa) Alternate Design, as described under (a) except five spans.... 25,290.00

(bb) Same as (aa) except with wood floor and steel joists for..... 19,000.00

(cc) Same as (aa) except with wood floor and wood joists for..... 17,200.00

(dd) Same as (aa) except with 12′ 0″ roadway for..... 24,520.00

(ee) Same as (dd) except with wood floor and steel joists for..... 18,400.00

(ff) Same as (dd) except with wood floor and wood joists for 17,030.00

(g) For wood railing instead steel railing deduct..... 500.00

(h) For bolting field connections instead of riveting deduct..... 250.00

(j) For concrete web between steel cylinders, add ..... 25.00 per yd

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place..... 20.00 per yd

(b) Additional structural steel in place. 7.5¢ per lb.

(c) Additional reinforcing steel in place 7¢ per lb.

(d) All other work will be done on the percentage basis at actual cost plus 15%.

All the above proposals, while bid on separately, are for all seven bridges and cannot be accepted for any one bridge. If, however, we are low bidder on 75% or 80% of the work; we will entertain a proposition from your Honorable Board, but it is our in-

tention to do all of the work and we have bid accordingly.

Respectfully submitted,

MESMER & RICE.

By LOUIS F. MESMER.

Holbrook, Arizona, July 1st, 1916." [47]

That on the 7th day of August, 1916, the Board of Supervisors of Navajo County defendant above named having regularly convened for the purpose of acting upon the proposals and specifications submitted by plaintiff for the erection of the bridge mentioned, made and entered its order that the bid of plaintiff submitted under the firm name of Mesmer & Rice of Los Angeles California being the lowest and best bid received for the construction of the bridge across the Little Colorado River, near Winslow, at a cost of $23,800.00, the same was accepted and approved subject to approval of contract, specifications and plans therefor by the United States Indian Department, which Department was to pay one half the costs of the construction of said bridge; and that thereafter, pursuant to said order, entered into a contract and agreement with plaintiff, under and by the terms of which plaintiff was authorized to enter upon the construction of said bridge T–3, for the sum of $23,800.00; and in addition thereto it was provided by the terms of said contract that the extra sub-structure of said bridge was to be paid for "as per *addenda* for extras upon the proposal accepted."

Such contract is in words and figures as follows, to wit:

"This agreement, made and entered into this 5th day of September, A. D. 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part, and Louis F. Mesmer, doing business under the name of Mesmer & Rice, of Los Angeles, California, the party of the second part,

WHEREAS the party of the first part heretofore advertised for bids for the construction and building of certain bridges and,

WHEREAS said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the 3rd day of July, A. D. 1916, for the constructing and building of the bridge hereinafter mentioned, and

WHEREAS the party of the second part submitted bid for construction and building said bridge, and, [48]

WHEREAS, the said bid of the party of the second part appears *to the* lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and,

WHEREAS, for the purpose of identification and to set forth more fully the provisions and stipulations of this contract, said call for bids with specifications for such bridge is hereto attached and made a part hereof, and

WHEREAS, for the same purposes the said bids are hereto attached, and made a part hereof, and

WHEREAS the said party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described,

for the sum of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars,

NOW, THEREFORE, the said party of the second part has agreed and by these presents does agree to and with the party of the first part, for and in consideration of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars, to furnish all the materials and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications designated and attached hereto and made a part hereof, to construct and erect the following bridge, upon the site herein named to wit:

Bridge T–3, over Little Colorado River, east of Winslow.

Superstructure: 3–165′, riveted H. T. steel spans as per superstructure plan on drawing No. 4183; substructure to be as follows (as per *addenda* for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8′ in diam., filled with a rich concrete resting upon twelve piles driven to a refusal of a fifteen tons load each; the upper steel cylinder *be* fifteen feet in length or such that its upper end will be level with a point two feet above the bottom chord of the adjoining A. T. & S. F. R. R. Bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be 6 ft. in diam. and filled with a rich concrete mixture connected with the lower concrete by 12 1″ twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18″ reinforced concrete wall of an equal length with the said upper

cylinders and abutments to consist of two thirty foot steel cylinders each, six feet in diam. filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall.

It is further agreed that in the event of any changes being made by the party of the first part, or any extras required by the party of the first part, such charges of extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore [49] described, according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party of the second part, in constructing said bridge in accordance with Clause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part, at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the

aforesaid bridge shall be made immediately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law ~~except part to be paid by U. S. Government is to be paid according to custom of Indian Department in contracts of this kind as regards time of payment.~~

R. C. C.
Geo. W. H.
Q. R. G.

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

It is also stipulated that as evidence of good faith in the performance of this contract, the said Louis F. Mesmer will furnish and give to the party of the first part good and sufficient bond in the penal sum of six thousand dollars.

The party of the second part shall provide sufficient safe and proper facilities at all times for the inspection of the work by the party of the first part, or its agent, and shall within twenty-four hours after receiving written notice from the party of the first part, or its agent, to that effect, proceed to remove from the grounds all materials which may be condemned, whether worked or unworked, and to tear down all portions of the work which may be condemned by the party of the first part or its agent, as unsound or improper, or in any way failing to conform to the plans and specifications hereinbefore mentioned, and it is understood that the party of the first part will at all times have an inspector present during the progress of the work on the bridge here-

inbefore mentioned, and if not, this clause in this contract is null and void.

Should the party of the second part be obstructed or delayed in the prosecution or completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The party of the second part agrees and stipulates that if he shall delay the material progress of the work so as to cause any damage for which the party of the first [50] part may become liable, or perform any other act for which the party of the first part may become liable, then and in that event the party of the second part shall make good to the party of the first part any such damage.

If at any time there shall be evidence of any lien or claim for which, if established, the party of the first part might become liable, and which is chargeable to the party of the second part, the party of the first part shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to indemnify it against such lien and claim, and should there prove to be any such claim, after all payments are made, the party of the second part shall refund to the party of the first part all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the default of the party of the second part.

It is further mutually agreed by and between the parties hereto that no certificate given nor payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed as an acceptance of defective work or improper materials.

It is also understood and agreed that A & B company Standard Specifications for highway bridges have been and are hereby adopted as the general reference for the construction of the bridge mentioned herein.

~~It is also hereby stipulated that the plans, specifications~~ and form of contract for the building of the bridge hereinbefore specified, are subject to the approval of the United States Indian Department, R. C. C. Geo. W. H. and that this contract is not fully binding until the Congressional appropriation of fifteen thousand and no/100 ($15,000.00) dollars for said bridge is available for use in the ~~construction of said bridge.~~

The said parties for themselves, their successors and assigns, heirs, administrators and executors, do hereby agree to the full performance of the covenants herein contained, and conform to the specifications and plans hereto annexed and made a part hereof, except where either of same may be changed in accordance with the provisions hereinbefore mentioned.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands the day and year first above written.

NAVAJO COUNTY,
By R. C. CRESWELL,
Chairman.
GEO. W. HENNESSEY,
Member,
Q. R. GARDNER,
Member,
Board of Supervisors.
[Seal] Attest: DEE M. MOSS,
Clerk, Board of Supervisors.
LOUIS F. MESMER,
Doing Business Under Name of Mesmer & Rice."

[51]

IV.

Plaintiff alleges that as hereinabove set forth he entered into said contract on the 5th day of September, 1916, and immediatey thereafter commenced the construction of said bridge according to the terms and specifications of said contract; that on or about the 9th day of August, 1916, plaintiff was informed by C. E. Perkins, the then County Engineer of defendant, acting in its behalf by and with authority of the Board of Supervisors of said defendant, that there would be available for the construction of said bridge the sum of fifteen thousand ($15,000.00) dollars, being a portion of the amount appropriated by the Indian Department of the Federal Government, provided that certain changes should be made in the specifications theretofore by

plaintiff submitted, so that said construction should fulfill the requirements of the Indian Service; that said requirements were not at said time known, either to plaintiff or defendant, and for this reason it was agreed and understood between plaintiff and the said C. E. Perkins, and also by the Board of Supervisors of said defendant, that the changes in the construction and specifications which might be required to be made in order to fulfill the requirements of the Indian Service should be paid for as extras at the rates and prices provided for in the *addenda* both to the specifications and the contract; that from time to time subsequent to the 5th day of December, 1916, and during and including the time up to the completion of said bridge changes so required were made with the knowledge of defendant, acting through its County Engineer and its Board of Supervisors, and that such changes and alterations consisted of the use of additional material; in the thickness of the steel cylinders, and also in the top and bottom chords and in the lower lateral bracing, all of which necessitated the use of materials and [52] labor as hereinafter in this complaint set forth, and all of which plaintiff alleges it was understood and agreed should be paid for as extras.

V.

Plaintiff alleges that changes hereinbefore required to be made in the original plans and specifications, which prior to the 9th day of August, 1916, had been submitted by plaintiff and accepted by defendant, were agreed to be made on and subsequent to the 9th day of August, 1916; that it was further

agreed between plaintiff and the County Engineer of Navajo County, acting by and with the consent, knowledge and authority of defendant through its Board of Supervisors; that the sum of $15,000.00 appropriated by the United States Government to be disbursed through the Commissioner of Indian Affairs would be available for the construction of said bridge in addition to the sum appropriated by defendant; that it was not known on said 9th day of August, either by plaintiff or defendant, what changes if any might be required to be made by the Commissioner of Indian Affairs for which reason plaintiff alleges it was agreed between plaintiff and defendant, acting through its board of Supervisors and County Engineer, that such changes as might be required in order to make said sum of $15,000.00 available, should be paid for as extras and be furnished at prices designated in the proposal attached to said contract in accordance with the terms thereof in the following words:

"If, after construction has started, it becomes apparent that additional quantitles are required, we hereby propose to furnish

(a) Additional concrete in place....$20.00 per yd.
(b) " structural steel in place 7.5¢ " lb.
(c) " reinforcing steel in place ..... 7. ¢ " "
(d) All other work will be done on a percentage basis at actual cost plus 15%."

That such changes were directed partly in writing and partly in parol by the said County Engineer and

by the Superintendent of [53] Construction of the Indian Service, acting in conjunction with said County Engineer; that plaintiff, relying upon the understanding and agreement so had with defendant, both as set forth in said written contract and as understood and agreed between plaintiff and defendant, its officers and agents, on or about the 9th day of August, 1916, completed said bridge in compliance in all respects with its contract and agreement, at an expense to him over and above the original contract price of $23,800.00 of the sum of $13,973.65, which sum plaintiff alleges became and was a necessary expenditure by reason of the changes directed by defendant as aforesaid in the construction of said bridge with superstructure and approaches in a manner so as to comply with the requirements of the Indian Service, and make available to defendant the appropriation by the Federal Government of the sum of $15,000.00; that the items of expense incurred in making said changes are as follows, to wit:

Extras required by Mr. Perkins & U. S. Govt.—

Cylinder steel, 63,278#—7½¢	4,745.00
Superstructure steel, 7740#—7½¢	580.00
Reinforcing—bonding upper and lower cylinders, 1960#—7¢	137.20
Reinforcing—in web walls, 1235#—7¢	86.45
Extra Concrete—in cylinders 236 yds.—$20	4,720.00
Extra Concrete—in web walls 29 yds.—$25	725.00
Extra piling, 44 piles—$15	660.00

Extra excavation, 136 yds.—$5..... 680.00
Extra work and material required by Inspector—
Drilling holes..... 27.14
Reinforcing, 1958.4#..... 137.08
Labor furnished Engineer..... 31.40
Additional length of Piling required by Board—
Original estimate based on Piling 16′ long, 1640′—$1.00.....1,640.00

VI.

That upon the completion of said bridge by plaintiff, on or about the 3d day of December, 1917, plaintiff presented to defendant, through its Board of Supervisors, statement of the amount due him on account of labor and materials performed and [54] supplied for the construction of said bridge under the conditions hereinabove set forth, showing a balance due from defendant to plaintiff of the sum of $13,973.65. That on said date defendant, through its Board of Supervisors, rejected the claim of plaintiff so presented and refused and still does refuse to pay the said sum of $13,973.65, or any part thereof.

VII.

Plaintiff alleges that subsequent to the 9th day of August, 1916, and during a period of more than four months thereafter, defendant, through its Board of Supervisors and County Engineer, entered into a series of conferences with representatives of the Indian Department of the United States Government for the purpose of determining what changes and alterations from the original plans and specifications submitted by plaintiff would be made necessary so

as to meet the requirements of the Indian Department and permit defendant to avail itself of the $15,000.00 so as in this complaint alleged, appropriated by said Indian Department. That by reason of such acts on the part of defendant, its officers and agents, plaintiff was prevented from entering upon the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original specifications, and was delayed in the commencement of said work during the year 1916 until December 26th, 1916; that such delay ensuing and so caused, as aforesaid, was without the fault of plaintiff and resulted in preventing plaintiff from entering upon the construction of said bridge during the period, in the years 1916 and 1917, when through the absence of flood waters in the Little Colorado River, said bridge could have been constructed at a minimum cost. That the expense incident thereto was not provided for in the contract hereinabove set forth, as would have been the case had plaintiff known that such delays would have [55] ensued, and that by reason of such delays, through the interference of flood waters and increase in the cost of material, plaintiff, in addition to the sum of $13,973.65, hereinabove in this complaint claimed as the actual cost of extra material, was compelled to expend and did expend the further sum of $3,216.00, the payment of which sum plaintiff alleges was and now is justly due him from defendant; that the changes and alterations so made were directed partly in writing and partly in parol.

VIII.

That on the 3d day of December, 1917, plaintiff accepted from defendant the sum of $6,204.62 on account of the amount so due him as aforesaid. That said sum was accepted by plaintiff under protest, and with the knowledge on the part of defendant that plaintiff was dissatisfied with such amount, and with the reservation on the part of plaintiff of his right to sue for the further sum of $17,189.65, being the balance due him under and by the terms of said contract. That said sum of $6,204.62 was paid by defendant to plaintiff on account of his contract on Little Colorado River bridge, together with extras therein listed the items of which were at the time of the allowance of said sum annexed to the claim and voucher therefor. That it was understood and agreed between plaintiff and defendant that the acceptance by plaintiff of the warrant for such sum of $6,204.62 should not be by defendant paid or by plaintiff received in liquidation or settlement of the amount claimed to be due him under the terms of his said contract.

IX.

Plaintiff alleges that there is now due and owing to him from defendant on account of said contract the sum of $17,189.65, with legal interest thereon from the 3d day of December, 1917. [56]

WHEREFORE plaintiff prays judgment against defendant in the sum of $17,189.65, together with interest as herein stated, and for costs of suit.

GEORGE J. STONEMAN,
Attorney for Plaintiff,
803 H. W. Hellman Bldg, Los Angeles, Cal.

[Endorsed]: Amended Complaint. Filed May 10, 1922. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [57]

Regular October, 1923, Term, at Phoenix.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, January 14, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JANUARY 14, 1924—ORDER RE MOTION TO DISMISS.

George J. Stoneman, Esquire, appears for the plaintiff. E. S. Clark, Esquire, is present for the defendant.

The defendant having heretofore filed its motion for dismissal of this cause for lack of prosecution, and the Court being fully advised, IT IS OR-

DERED that said motion be and the same is hereby overruled.

By consent of both parties in open court, IT IS ORDERED that this case be transferred to the Phoenix Division of this Court for trial; and IT IS FURTHER ORDERED that this case be set for trial Monday, March 17th, 1924. [58]

Regular October, 1923, Term, at Phoenix.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, March 17th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 17, 1924—TRIAL.

This case comes on regularly for trial this date. The plaintiff, Louis F. Mesmer, is present in person with counsel, George J. Stoneman, Esq.

The defendant, Navajo County is represented by Messrs. Clark & Clark, Esqs., Thorwald Larson, Esq., and C. H. Jordan, Esq. Both sides announce readiness for trial.

D. A. Little is duly sworn as court reporter, on request of the defendant.

The plaintiff asks leave of the Court to amend his amended complaint by interlineation in the fourth paragraph on page 5 at line 14 after the word "bridge" by inserting the words "upon the site herein named." The Court now orders that the amendment by interlineation is permitted.

The plaintiff now asks leave to further amend said complaint by interlineation in line 17 on page 5, by substituting the word "substructure" in the place of the word "superstructure." Thereupon, it is ordered that the word "substructure" be substituted for the word "superstructure." The defendant excepts and the exception is by the Court duly allowed.

The plaintiff further requests leave to amend his amended complaint by interlineation by inserting after the word "resident" in paragraph one the words "and resident." Whereupon, it is ordered that such amendment is allowed. The defendant excepts to the ruling of the Court, and the exception is ordered allowed. [59]

Eighteen jurors are ordered called into the jury-box; whereupon, counsel for the plaintiff announces that it is his understanding that this was to be a nonjury trial; the defendant concurs in said under-

standing, and thereupon, it is stipulated by counsel for both sides in open court that a jury in this case is waived, further announcing that written stipulation waiving jury will be prepared and filed this date. Thereupon, all jurors in attendance are ordered excused until Thursday, March 20th, 1924, at 9:30 A. M.

The plaintiff now makes statement of his case, and the defendant makes statement of its case.

To maintain his case the plaintiff calls witnesses as follows, who are duly sworn and examined:

Wallace Elsworth; said witness is called under the provisions of Section 1680 of the Civil Code of Arizona 1913 for the purpose of cross-examination.

C. H. Jordan.

R. C. Creswell; said witness is called under the provisions of Section 1680 of the Civil Code of Arizona 1913 for the purpose of cross-examination.

C. E. Owens; said witness called under provisions of Section 1680 of the Civil Code of Arizona 1913 for the purpose of cross-examination.

Exhibits are admitted and filed on behalf of the plaintiff as follows:

Exhibit No. 1 (Call for bids).

Exhibit No. 2, offered for identification only.

Exhibit No. 3 (Contract).

Exhibit No. 4 (Report).

Exhibit No. 5 (Telegram).

Exhibit No. 6 (Letter Dept. Interior, Sept. 27, 1916).

Exhibit No. 7 (Letter of Sept. 14, 1916).

Exhibit No. 8 (Letter of May 23, 1918).

Exhibit No. 9 ("Demand," Oct. 1, 1917).

Exhibit 10 ("Demand," Nov. 5, 1917).

Exhibit No. 11 ("Demand," Dec. 3, 1917).

Exhibit No. 12 (Copy of "Demand" dated Dec. 3, 1917).

Exhibit No. 13 ("Nichols Report," Aug. 9, 1916).

Exhibit No. 14 ("Report," of Perkins).

Exhibit No. 15 (Copy telegram May 19, 1918, Stoneman to Creswell).

Exhibit No. 16 (Telegram, Creswell to Stoneman).

Exhibit No. 17 ("Demand," May 21, 1918).

It is now stipulated that Plaintiff's Exhibits No. 8 and No. 17 may be attached together for the purposes of the record.

Thereupon, IT IS ORDERED that this case be recessed until 9:30 o'clock A. M., Tuesday, March 18th, 1924. [60]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, March 18th, 1924.)

No. L-56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 18, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon further trial of this case is resumed.

R. S. Teeple is called, duly sworn and examined on behalf of the plaintiff.

Stipulation is now made between the parties hereto that the record may show the waiver of a jury for the trial of this case. Said waiver of both parties is now ordered by the Court to be entered as made orally before the trial commenced. The stipulation was that the matter be tried without a jury.

Counsel for the plaintiff now states that the witness, R. S. Teeple, was called for examination under the provisions of Section 1680 of the Civil Code of Arizona 1913. IT IS ORDERED by the Court that said witness was so called; to which ruling of the Court the defendant duly excepts.

Exhibits are admitted and filed on behalf of the plaintiff as follows:

Exhibit No. 18 ("Demand" for documentary evidence).

Exhibit No. 19 (Carbon copy of Demand of May 7, 1917).

Exhibit No. 20 (Blue-print plans).

Exhibit No. 21 (Plans).

Louis F. Mesmer, plaintiff herein, is now duly sworn and examined as a witness in his own behalf.

Thereupon, IT IS ORDERED that this case be continued to Wednesday, March 19th, 1924, at 9:30 A. M., for further trial. [61]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Wednesday, March 19, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 19, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon, further trial of this case is now resumed.

Examination of Louis F. Mesmer, plaintiff herein, is resumed.

Defendant's Exhibit "A" is offered and marked for identification.

Defendant's Exhibit "B" is admitted and filed (being "Release").

At plaintiff's request, IT IS ORDERED that deposition of Thomas F. Nichols be opened. Thereupon, the plaintiff reads in evidence the deposition of Thomas F. Nichols.

Plaintiff's Exhibit No. 22 (Nichols Letter) is admitted and filed on behalf of the plaintiff.

Wallace Ellsworth, heretofore sworn, is recalled for further examination.

William H. Popert is called, duly sworn and examined on behalf of the plaintiff.

Thereupon, IT IS ORDERED that this case be continued for further trial to Thursday, March 20th, 1924, at 9:30 A. M. [62]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, March 20th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 20, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon, further trial is resumed.

Examination of Wm. H. Popert is resumed.

Defendant's Exhibit "C" is offered and marked for identification (being "Memo" dated August 12th, 1916).

Defendant's Exhibit "D" (Power of Attorney) is admitted and filed.

Now at the close of plaintiff's case, the plaintiff asks leave of the Court to amend his amended complaint as to paragraphs six and eight to conform to the proof submitted, which request is by the Court granted with the understanding that the defendant may file answer thereto.

Thereupon, the PLAINTIFF RESTS.

The defendant calls the following witnesses in its behalf:

John A. Freeman, sworn and examined.

C. E. Owens, heretofore sworn, is examined.

R. C. Creswell, heretofore sworn, is examined.

Thereupon, IT IS ORDERED that this case be continued to Friday, March 21st, 1924, at 9:30 A. M. for further trial. [63]

In the District Court of the United States for the District of Arizona, Phoenix Division.

No. 56—IN LAW.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

SUBSTITUTE PARAGRAPHS IN AMENDED COMPLAINT.

Leave of Court being first had and obtained, granting to plaintiff permission to file substitute paragraphs for the purpose of making the allegations of the amended complaint filed herein, conform to the proof, plaintiff makes and files the following as substitute paragraphs, in lieu of like numbered paragraphs in said amended complaint:

SUBSTITUTE PARAGRAPH VI.

That on the 5th day of November, 1917, plaintiff presented to the Board of Supervisors of Navajo County, at a meeting of said Board duly and regularly convened and held, a statement of the amount on said date claimed to be due him under the terms of his said contract, on account of labor performed and materials supplied in the construction of said bridge, showing a gross amount then due plaintiff

of $30,400.00, being, as also shown in said demand, eighty per cent (80%) of the total amount due without deducting therefrom the amounts theretofore paid by defendant. That said sum and said demand was, as therein shown, exclusive of 20% of the total cost [64] of construction, which last-named sum, amounting to $7,600.00, was provided by the terms of said contract to be paid by defendant immediately upon the approval and acceptance of said bridge by defendant.

That prior to said 5th day of November, as shown in said demand, defendant had paid to plaintiff the sum of $12,624.00, and no more, leaving a balance due of $17,776.00, exclusive of the 20%, amounting to $7,600.00, so withheld as in said demand set forth.

That on said 5th day of November, 1917, defendant allowed and paid to plaintiff a portion of said demand, to wit, the sum of $4,976.00, and thereafter, on the 3d day of December, 1917, made a further payment thereon in the sum of $6,204.62, leaving a balance on said date due of $6,595.38, and in addition thereto the sum of $7,600.00, provided in said contract to be paid plaintiff immediately upon the approval and acceptance by defendant of said bridge, which approval and acceptance, as plaintiff alleges, was given and made on said 3d day of December, 1917.

SUBSTITUTE PARAGRAPH VIII.

That at said meeting of said Board of Supervisors held on the 3d day of December, 1917, plain-

tiff requested said Board to pay the amount due upon his demand of November 5, 1917, and remaining unpaid thereon after said allowance and payment of $4,976.00 thereon; as a result of such request said Board of Supervisors agreed to pay a further portion thereof, to wit, the sum of $6,204.62, including therein only certain of the items at the prices as per *addenda* for extras, as in said contract set forth, and then and there demanded of plaintiff that he should sign a demand prepared by said Board, enumerating therein the items of said November demand [65] to be allowed, aggregating the sum of $6,204.62, and then and there advised plaintiff that they would make no further allowance or payment on account of the amount theretofore by plaintiff demanded. That said sum was accepted by plaintiff under protest, and with the knowledge on the part of defendant that plaintiff was dissatisfied with such amount, and with the reservation on the part of plaintiff of his right to sue for the further sum of $14,195.38, being the balance due him under and by the terms of said contract. That said sum of $6,204.62 was paid by defendant to plaintiff on account of his contract on Little Colorado River bridge, together with extras therein listed, the items of which were at the time of the allowance of said sum set forth in said claim. That it was understood and agreed between plaintiff and defendant that the acceptance by plaintiff of the warrant for such sum of $6,204.62 should not be by defendant paid or by plaintiff received in

liquidation or settlement of the amount claimed to be due him under the terms of his said contract.

GEORGE J. STONEMAN,
Attorney for Plaintiff.

[Endorsed]: Substitute Paragraphs in Amended Complaint. Filed March 20, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [66]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, March 21st, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,
Plaintiff,

vs.

NAVAJO COUNTY,
Defendant.

MINUTES OF COURT—MARCH 21, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon, trial is resumed.

Examination of R. C. Creswell is resumed.

Louis F. Mesmer, plaintiff herein, heretofore sworn, is recalled and examined by the defendant

under section 1680 of the Civil Code of Arizona 1913.

William H. Popert, heretofore sworn and examined, is now recalled by the defendant under section 1680 of the Civil Code of Arizona 1913, and further examined.

The defendant calls the following witnesses in its behalf:

Clarence H. Jordan, heretofore sworn, is examined.

Walter Dubree, sworn and examined.

Wallace Ellsworth, heretofore sworn, is examined.

Defendant's Exhibit "E" (Warrant #407) admitted and filed.

Defendant's Exhibit "A" (Memorandum) admitted and filed.

Defendant's Exhibit "C" (Memo. Aug. 12, 1916) admitted and filed.

Thereupon the DEFENDANT RESTS.

The PLAINTIFF RESTS.

The case is now submitted and taken under advisement and the plaintiff is given twenty (20) days from and after this date to submit brief of points and authorities on the questions indicated by the Court; the defendant is given twenty (20) days from date of service upon them to file reply brief; plaintiff is given ten (10) days from date of service of the reply brief in which to answer. [67]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

No. 56—IN LAW.

LOUIS MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

DEFENDANT'S ANSWER TO PARAGRAPHS 6 AND 8 OF AMENDED COMPLAINT, AS SUBSTITUTED MARCH 20, 1924.

Pursuant to leave of Court first had and obtained, the defendant files the following answer to the substitute paragraphs of plaintiff's amended complaint, which paragraphs were filed herein on March 20th, 1924.

Answering substitute Paragraph VI, defendant denies that plaintiff presented to the Board of Supervisors of Navajo County, Arizona, on the 5th day of November, 1917, an itemized statement, as required by the laws of Arizona, of the amount claimed to be due on said date for labor performed and materials supplied in the construction of the bridge described in plaintiff's amended complaint.

Defendant denies that the plaintiff ever presented to or filed with said Board of Supervisors of Navajo

County, Arizona, a duly itemized account, stating minutely what such claim was for and specifying each of the several items and the date and amount thereof within six months after the last item of such account accrued, and defendant further alleges that no itemized account of any kind or character of the demand now sued upon was [68] presented to the Board of Supervisors of Navajo County, Arizona, or filed in the files of said Board within six months from the date the last item of said account accrued.

Defendant denies that there was ever due plaintiff on account of his contract for the construction of the bridge mentioned in plaintiff's amended complaint, the sum of $30,400.00, and denies that there was ever due the plaintiff at any time upon said contract more than the sum of $23,800.00, less such payments as had theretofore been made.

Defendant specifically denies that on the 5th day of November, 1917, there was a balance due to plaintiff of $17,776.00, exclusive of the deduction of twenty per cent until completion of the contract, and denies that any sum whatsoever was due the plaintiff on that date, save and except the difference between the contract price of $23,800.00, and such payments as had theretofore been made by said Board of Supervisors.

Defendant denies that on the 5th day of November, 1917, the defendant allowed and paid the plaintiff the sum of $4,976.00, as alleged in said Paragraph VI of said amended complaint, but alleges

on the contrary that the defendant on that date paid to the plaintiff the sum of $4,976.00, and that the plaintiff received and credited the same as a part payment upon the contract price of $23,800.00, aforesaid, and not otherwise.

Defendant further denies that on the 3d day of December, 1917, the defendant made a further payment on the demand of plaintiff as stated in Paragraph VI of said amended complaint, but alleges on the contrary that on that date the defendant paid to plaintiff, and that the plaintiff received from defendant the sum of $6,204.62, as in full and complete settlement and satisfaction of all demands of the plaintiff against defendant [69] on account of the construction of said bridge, including all extras claimed by the plaintiff of every kind and character, and that upon the payment of said sum by defendant and the receipt thereof by plaintiff, there was a full and complete accord and satisfaction of all demands of every kind and character by the plaintiff against defendant.

Defendant therefore denies that after the payment of $6,204.62, there was a balance due the plaintiff of the sums mentioned in said Paragraph VI, and denies that there was any sum whatsoever due from the defendant to plaintiff after said sum of $6,204.62 had been paid.

Answering substitute Paragraph VIII, of said amended complaint, defendant denies that on the 3d day of December, 1917, the said Board of Supervisors agreed to pay, and denies that at any time

that it did pay the plaintiff the sum of $4,976.00, except as a part payment upon the contract price of $23,800.00, which plaintiff contracted to build said bridge for, and denies that the Board of Supervisors then or at any time agreed to pay the sum of $6,204.62, upon plaintiff's demand of November 5th, 1917.

Defendant further denies that plaintiff received said sum of $6,204.62 under protest, and denies that it was accepted with the reservation on the part of plaintiff of his right to sue for the further sum of $14,195.38, or any other sum whatsoever.

Defendant denies that said sum of $6,204.62 was paid by defendant to plaintiff upon any understanding whatever between plaintiff and defendant that the acceptance by plaintiff of the warrant for said sum should not be received by plaintiff as in liquidation or settlement of the full amount due him under the terms of his contract, but alleges on the contrary that said sum was received by plaintiff as hereinabove stated, to wit, as in full and complete satisfaction and payment of all demands of every kind and character of plaintiff against the defendant.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant.

[Endorsed]: Defts. Answer to Paragraphs 6 and 8 of Amended Complaint. Filed March 21, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Dep. Clerk. [70]

Regular April, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, April 8th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—APRIL 8, 1924—ORDER EXTENDING TIME TO AND INCLUDING APRIL 20, 1924, TO FILE BRIEF OF POINTS AND AUTHORITIES.

IT IS ORDERED BY THE COURT that time is hereby extended to April 20th, 1924, for the plaintiff to file his brief of points and authorities. [71]

Regular April, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, May 9th, 1924)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MAY 9, 1924—ORDER GRANTING DEFENDANT ADDITIONAL TIME TO FILE REPLY BRIEF.

On motion of the defendant, IT IS ORDERED that the time of the defendant is hereby extended ten (10) days from and after the time already allowed in which to file its reply brief herein. [72]

In the District Court of the United States, *Ninth Circuit,* for the District of Arizona.

No. L–56.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

DEFENDANT'S MOTION FOR JUDGMENT.

Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:

1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435, Revised Statutes of Arizona.

2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23d, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings. [73]

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5th, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called "extras" which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1,307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge and which were set forth in the contract, were to be paid for as "extras."

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a "memorandum of points and authorities," in support of its action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant.

[Endorsed]: Defendant's Motion for Judgment. Filed May 21, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [74]

Regular April, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, May 30th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MAY 30, 1924—ORDER GRANTING PLAINTIFF ADDITIONAL TIME TO FILE REPLY BRIEF.

IT IS ORDERED BY THE COURT that time of plaintiff is hereby extended ten (10) days from and after the time heretofore allowed in which to file reply brief. [75]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, July 8th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JULY 8, 1924—ORDER OVERRULING MOTION FOR JUDGMENT.

IT IS ORDERED BY THE COURT that the defendant's motion for judgment herein be and the same is hereby overruled. It is ordered that an exception be allowed and noted for the defendant. [76]

Regular March, 1924, Term, at Prescott.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, July 8th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JULY 8, 1924—JUDGMENT.

This cause having come on regularly for trial on the 17th day of March, 1924, the plaintiff appearing in person and by his counsel, George J. Stoneman, Esq., and the defendant appearing by its counsel, Clark & Clark, Esqs., Thorwald Larson, Esq., and C. H. Jordan, Esq., and the jury having been waived by stipulation in open court, and evidence having been submitted to the Court, both by the plaintiff and the defendant, and thereupon the cause having been argued, and on the 21st day of March, 1924, submitted to the Court for its consideration, and the defendant having moved the Court for judgment, which motion of the defendant was ordered overruled, now after due consideration of the

case and the Court being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Louis F. Mesmer, do have and recover of and from the defendant, Navajo County, the sum of Thirteen Thousand Eight Hundred Seventy-two Dollars and Sixty-five Cents ($13,872.65), together with his costs herein sustained taxed at the sum of One Hundred Fifty-two Dollars and Ten Cents ($152.10).

Exceptions are ordered entered on behalf of both the plaintiff and the defendant. [77]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, July 11th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JULY 11, 1924—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

IT IS ORDERED BY THE COURT that time of the defendant, Navajo County, in which to file

its bill of exceptions herein is hereby extended seventy-five (75) days from and after the time allowed by law.

An exception to said order is ordered saved to the plaintiff. [78]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, October 2d, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 2, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 17, 1924, TO FILE BILL OF EXCEPTIONS.

On application of the defendant, good cause appearing therefor, the time within which to prepare and file bill of exceptions in this case is hereby ordered extended to and including the 17th day of October, 1924. [79]

In the District Court of the United States, District of Arizona.

No. L–56—PRESCOTT.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 17th day of March, 1924, at a stated term of the above-entitled court, begun and held in Phoenix, in and for the District of Arizona, before the Honorable Fred C. Jacobs, District Judge, the issues joined in the above-entitled cause between the said parties, to wit, an action by plaintiff against defendant to recover $13,973.65 for extras alleged to have been furnished by plaintiff under its contract with defendant for the construction of a certain bridge over the Little Colorado River near Winslow, Arizona, and $3,216.00 for damages alleged to be due to delays caused by defendant (the latter item having been during the trial eliminated by plaintiff from his complaint), came on to be tried before the said Judge, without the intervention of a jury, the parties aforesaid, by their counsel, having, by oral stipulation in open court, waived a jury.

The plaintiff was represented by George J. Stoneman, Esq., his attorney, and the defendant by Thorwald Larson, County Attorney, and by E. S. Clark and Neil C. Clark, of counsel, and upon the trial of that issue the attorneys for the said Louis F. Mesmer, plaintiff, to maintain and prove the said issue on his part, called as a witness Wallace Ellsworth, who being duly sworn, testified, among other things, as follows: [80]

TESTIMONY OF WALLACE ELLSWORTH, FOR PLAINTIFF.

Q. Give your name, Mr. Ellsworth, to the reporter. A. Wallace Ellsworth.

Q. Where do you reside, Mr. Ellsworth?

A. Holbrook, Arizona.

Q. What official position, if any, do you now occupy? A. Clerk of the Board of Supervisors.

Q. How long have you been Clerk of the Board?

A. Since January 1, 1923.

Q. As Clerk of the Board of Supervisors, have you in your custody, care and control, the records and the books, papers and documents making up the matters filed with the Board of Supervisors of that county? A. Yes, sir.

Q. You appear here, Mr. Ellsworth, in response to a *subpoena duces tecum* to produce certain books, papers, and documents, do you not? A. Yes, sir.

Q. Have you brought with you such of those books, papers and documents as you were able to

(Testimony of Wallace Ellsworth.)

find, in response to the subpoena? A. Yes, sir.

Q. Have you the call for bids of Navajo County for bridge construction that I think I said that I would designate as No. 1?

(Witness produces document.)

Q. You hand me what is the call for bids in response to my question? A. Yes, sir.

Q. Does this call for bids contain also brief specifications showing the construction desired upon the different bridges to be built by the county?

Mr. CLARK.—I rather think that the instrument speaks for itself, your Honor.

Mr. STONEMAN.—Withdraw the question, Mr. Clark. I would like to offer this evidence at this time. If you object to it I will mark it for identification. We offer it in evidence and ask that it be marked with the proper designation as plaintiff's exhibit. I limit my offer to the use of this instrument only in so far as it relates to the construction of Bridge T–3 upon which this action is based.

Mr. CLARK.—If the Court please, we shall object to it upon the ground that it is immaterial, it appearing that long after that a contract was signed with full specifications, to which counsel has already referred, and that a mere proposal for bids would have no bearing whatsoever on that one way or [81] the other, no matter what it might be and that it is immaterial and an encumbrance of the record."

Following the foregoing objection, the following colloquy took place between the Court and counsel:

"The COURT.—This does not tend to alter or change or modify the contract in any way, that is, contradict it?

Mr. STONEMAN.—It simply shows the inception of this transaction and also includes in it certain specifications upon which the proposal and specifications afterwards made and drafted by the plaintiff in this case, and in that respect we deem it material."

WHEREUPON the Court overruled the objection aforesaid, to which ruling the defendant then and there excepted and thereupon said call for bids was admitted in evidence, marked Plaintiff's Exhibit 1. Whereupon the following evidence was offered by counsel for plaintiff:

"Mr. STONEMAN.—We offer in evidence what purports to be a copy of an original report addressed to the Supervisors of Yavapai County, and purported to be signed by Charles E. Perkins, County Engineer, and I ask that it be marked Plaintiff's Exhibit 4."

To which offered evidence counsel for the defendant then and there objected on the ground that it was a copy; that no foundation had been made for the introduction of secondary evidence. That there was no showing that Mr. Perkins himself could not have been called and identified and relate the history connected with it. That it bore neither

(Testimony of Wallace Ellsworth.)

date nor signature, nor was it in anywise identified as an official report.

THEREUPON the following colloquy occurred:

"The COURT.—Mr. Ellsworth, have you endeavored to find the original of this report?

A. Yes, sir.

Q. Have you searched the files of the office diligently for that purpose? A. Yes, sir.

Q. Have you inquired as to the original? [82]

A. Yes, sir.

Q. You have been unable to find it?

A. I have been unable to find it.

Q. It is not in the files of the office where it belongs? A. No, sir.

The COURT.—Is there any further objection to it?

Mr. CLARK, of Counsel.—We have, I think, made the objection that it is irrelevant and incompetent and immaterial and that it has not been established in any way by any evidence as the report of the officer whose report it purports to be—nothing of any kind or character. In other words, it imports no verity or authenticity as it stands and we avow—I am speaking for myself—that it is something new to us entirely.

The COURT.—Why, the gentleman who made the report was the County Engineer.

Mr. CLARK.—C. E. Perkins was County Engineer at the time this contract was made.

The COURT.—You admit that?

(Testimony of Wallace Ellsworth.)

Mr. CLARK.—But he was not authorized to speak for, or bind this Board of Supervisors in any way at that time.

The COURT.—Well, the contract under which this suit is based refers to the engineer and it confers certain powers upon him. Of course, I don't know what this report says but this report may be a statement of his conduct under the terms of the contract."

THEREUPON counsel withdrew that portion of his objection based upon his statement that there was no showing that Mr. Perkins himself could not have been called and identified, but not withdrawing any of the other objections. Whereupon, said objection was by the Court overruled, to which ruling the defendant then and there excepted, and said purported report was admitted in evidence as Plaintiff's Exhibit No. 4, which said exhibit is hereto attached and properly marked, for identification and is asked to be read and considered as though herein fully set out.

WHEREUPON said witness was asked by counsel for plaintiff the following question:

"Mr. STONEMAN.—Under what date of the meeting of the Board of Supervisors is that minute entry made?

A. Under date of August 7, 1916. [83]

Q. Read that into the record.

Mr. CLARK.—Now, if the Court please, we shall object to that on the ground that it is irrelevant, incompetent, and immaterial and that on its fact it

was a minute of the Board of Supervisors made prior to the execution of the contract between the plaintiff and defendants here and that different conditions may have been talked of or discussed or placed of record prior to that time having no bearing on the contract itself and are no part of it and, therefore, ought not to be admitted in evidence unless shown in the contract itself.

The COURT.—What does it purport to be?

Mr. STONEMAN.—The purport of it is that the bid of Mesmer and Rice, being the best bid, is accepted and approved subject to the approval of the contract, specifications and plans by the United States Indian Department.

Mr. CLARK.—We think your Honor can see that it is immaterial. The contract or the bid must have been accepted or there would have been no contract and, if the latter part of this, which refers to the Indian Department, is in the contract itself, which it is not, then this might shed some light on it but, inasmuch as it is not and everything pertaining to the Indian Department was carefully stricken from the contract before signing, we say this can have no bearing.

The COURT.—Don't you put them upon proof by the allegations of your answer as to the very subject of the execution of this contract?

Mr. CLARK.—Not as to anything prior to the date of the contract itself and we confine our answer to that. There are certain allegations in the complaint as to what transpired afterwards, which, of course, are material and we have denied those

in so far as we have seen proper. In any event, he would not be put to proof of any immaterial matter.

The COURT.—No. The objection is overruled."

To which ruling counsel for defendant then and there duly excepted and the witness read the record in question as follows:

"A. The bid of Mesmer & Rice of Los Angeles, California, being lowest and best bid received for the construction of bridge across the Little Colorado River near Winslow at a cost of $23,800.00, the same is accepted and approved subject to approval of contract, specifications, and plans therefor by the United States Indian Department, which department expects to pay one-half of the cost of construction of same bridge."

THEREUPON the plaintiff further to approve and maintain the said issue on his part, called as a witness R. C. Creswell, counsel stating that he was calling said witness under provisions of paragraph 1680, R. S. A. 1913, for the [84] purpose of cross-examination.

(Paragraph 1680 reads as follows: A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended or the directors, officers, superintendent or managing agent of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-exammation, at the instance of the adverse party or par-

ties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony. Such witness when so called may be examined by his own counsel, but only as to the matters testified to on such examination.)

THEREUPON counsel for defendant objected to the cross-examination of said witness for the reason that he was not then a supervisor; that he is in no official position of any kind or character, having left the office, and that anything he might testify to at this time should proceed under the usual rule, as plaintiff's witness without the right of cross-examination; that as the official relation has ceased one who has been an officer may be made a witness only as other witnesses and it would be highly dangerous to invoke any other rule. That the witness is now a private citizen not bound by official sanction.

THEREUPON the following colloquy occurred:

"The COURT.—Well, the rules of evidence in the State Courts do not apply in the Federal Court.

Mr. STONEMAN.—No, I know that.

The COURT.—Q. During all of these proceedings, Mr. Creswell, were you a member of the Board?

A. Yes, sir. That is, during the time the contract was being let and settled up.

The COURT.—You are offering him for cross-examination?

Mr. STONEMAN.—Yes, sir. I don't want necessarily to be bound. I don't know what he is going to say. I never talked to him, being an adverse witness.

The COURT.—You are merely going to examine him as to this contract and his participation in it? [85]

Mr. STONEMAN.—Yes, sir.

The COURT.—Well, the objection will be overruled. However, you will be limited to that contract and matters that occurred before he retired from the Board.

Mr. STONEMAN.—Yes, sir.

To which ruling counsel for the defendant then and there excepted.

THEREUPON said witness testified among other things, as follows:

TESTIMONY OF R. C. CRESWELL, FOR PLAINTIFF.

"Mr. STONEMAN.—Q. Mr. Creswell, do you remember receiving during the month of September or perhaps October, 1916, a letter addressed to you as chairman of the Board of Supervisors by E. B. Merritt, Assistant Commissioner of Indian Affairs? A. Yes, sir.

Q. Would you recognize a copy of the letter, if you saw it? I hand you what we think is a copy of the letter and ask you if you received the original?

(Testimony of R. C. Creswell.)

A. Yes, sir. I think I received the original of that, if I remember.

Q. Do you know where the original is, Mr. Creswell? A. No, sir, I do not.

Q. You left it, I suppose, with the Board of Supervisors?

A. Well, I either left it there or copy there. This was sent direct to me at Winslow.

Q. Did you communicate the contents of that letter when it was received by you to the Board of Supervisors? A. Yes, sir.

Mr. STONEMAN.—We offer this in evidence now and ask that it be marked Plaintiff's Exhibit 6.

Mr. CLARK.—That has been marked plaintiff's exhibit already.

Mr. STONEMAN.—That has been marked plaintiff's exhibit for identification.

Mr. CLARK.—We object to it on the ground that it is immaterial and hearsay.

The COURT.—Q. How did you get it—through the mail? Did it come to you through the mail?

A. Yes, sir.

Mr. CLARK.—Please add to that objection that it is incompetent.'' [86]

The COURT.—Objection is overruled.

To which ruling of the Court the defendant then and there excepted.

THEREUPON said purported letter was admitted in evidence as Plaintiff's Exhibit No. 6, and is hereto attached as such exhibit duly numbered for

(Testimony of R. C. Creswell.)

identification and asked to be read and considered as a part hereof.

"Mr. STONEMAN.—Your Honor has read the letter?

The COURT.—Yes, sir. Was that marked for identification?

The CLERK.—Yes, No. 6.

The COURT.—It is now 6 in evidence."

WHEREUPON said witness further testified as follows:

"Mr. STONEMAN.—Q. I hand you what purports to be a copy of a communication dated at Holbrook, August 9, 1916, addressed to the Board of Supervisors of Navajo County, purporting to be signed by Thomas F. Nichols for the State Engineer, and ask you if you ever saw the—ask you to examine this copy and state whether or not you ever saw the original of it?

A. It has been so long that I don't know whether I could recall the exact wording but he made such a report I know. (Witness reads document.) As far as I know, I think it is a copy of the report from Mr. Nichols, State Engineer.

Mr. STONEMAN.—We offer this copy to which the witness has just testified and ask that it be marked as a plaintiff's exhibit with the appropriate designation."

(Counsel for plaintiff asked counsel for defendant if they had the original of this report, and were informed that they did not.)

(Testimony of R. C. Creswell.)

The copy to which the witness had just testified was then offered in evidence to which offer counsel for defendant objected on the ground that on its face it was a report made prior to the filing of the contract. That all prior matters were deemed to be incorporated in it. That it was immaterial, irrelevant and incompetent; that it is hearsay as it stands, and without authenticity. Which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON said copy was admitted in evidence as Plaintiff's Exhibit 13, a copy of which exhibit duly numbered for identification is hereto attached and asked to be read and considered as a part hereof.

THEREUPON the plaintiff offered in evidence further [87] testimony on the part of said witness as follows:

"Mr. STONEMAN.—Q. When did you see the demand that I filed on behalf of Mesmer and Rice with reference to the time that some kind of a meeting, legal or otherwise, was held by the Board of Supervisors on or about the 23d day of May, 1918?

A. Well, I can't remember those dates at all.

Q. You remember the meeting being held, don't you?

A. I remember hearing them talk about it, yes, but as I say, I don't remember being at that meeting.

Q, Who talked to you about it?

(Testimony of R. C. Creswell.)

A. I think Mr. Owens did.

Q. What did Mr. Owens say?

To which question the counsel for defendant then and there objected on the ground that it was hearsay and immaterial. His objection was by the Court sustained.

THEREUPON the following question was purported by counsel for plaintiff:

"Q. How did Mr. Owens or Mr. Freeman happen to speak to you at all about it, do you know?" To which question counsel for defendant made the objection that it was immaterial and that it called for a conclusion. Which objection was by the Court overruled. To which ruling, defendant then and there excepted and the witness thereupon testified as follows:

"A. Well, as I remember, Mr. Owens remarked that Mr. Stoneman was over there and wanted to reopen that case of Mesmer & Rice, and they could not see any necessity of reopening it. They said they had paid them in full.

Q. How did you first acquire any information as to whatever was done at this meeting?"

To which question counsel for defendant objected on the ground that it was immaterial.

WHEREUPON the following colloquy ensued:

"The COURT.—He might have acquired the information from the record.

Mr. CLARK.—Then it would be more objectionable. It [88] would be pure hearsay if he re-

(Testimony of R. C. Creswell.)

ceived it from a record. The record would be the evidence.

The COURT.—Do you contend that the Board of Supervisors or any other board or public body may hold a special meeting and solemnly transact business that affects the rights of individuals and fail to record it and preclude the party from proving it after they have acted upon it?

Mr. CLARK.—No, sir, and we say that nothing of this kind has been done by this Board at any time. We will make this suggestion. First, that this meeting was not a meeting of the Board of Supervisors as such. It was called as a mere conference at Mr. Stoneman's request and the telegram upon which it was based was dated the 19th of May, 1923, and this meeting was held at his request on the 23d, only four days between the date of the telegram and the date of this meeting. Now, at this meeting, your Honor, the Board of Supervisors could not legally have taken any action upon any claim to the prejudice of this plaintiff. The statutes require that every claim be presented at a regular meeting, not a special meeting. A special meeting may not be held for the purpose of considering a claim and we think counsel is aware of that and, if no action was taken at that meeting, it was because among other things, that the claim was presented to the Board for the first time then and at a special meeting, at which they could not legally consider it. Now, I am not saying what counsel may have understood. I am stating

(Testimony of R. C. Creswell.)

the situation as it is to your Honor and we are within our rights in objecting to all of this testimony. We haven't a scrap of paper nor a word of testimony as to anything that happened that is not wide open to counsel and I think they too appreciate that. If certain things are gone, they are gone from us as well as from him."

Which objection was by the Court overruled. To which ruling defendant then and there excepted and the witness was then permitted to testify as follows:

"A. Well, just as I stated, I think Mr. Owens told me he had been over there—that Mr. Stoneman had been over there to Holbrook and talked with him and Mr. Freeman over this claim of Mesmer & Rice.

The COURT.—Mr. Creswell, you called that special meeting, did you not?

A. I sent that telegram that I got from Mr. Stoneman to the clerk and asked him to phone the other two members.

Q. Yes, and they were all present?

A. The other two were present, but I don't recall to my mind that I was there.

Q. You say you were not there?

A. I don't think I was there, Judge.

Q. Do you know that you were not there?

A. No, I was not there."

TESTIMONY OF C. E. OWENS, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

THEREUPON C. E. OWENS, who had theretofore been duly [89] sworn was recalled for further cross-examination in behalf of plaintiff, and among other things he was asked the following questions:

"Mr. STONEMAN.—Q. That was the meeting at which the warrant for $6,204.00 was paid?

A. Well, I don't remember as to the date. I remember that meeting, yes.

A. Now, the $6,204.00 was a part of the amount that has been claimed by Mesmer & Rice before December 3, wasn't it?"

To which question counsel for defendant then and there objected on the ground that it called for a conclusion of the witness and that the transaction must speak for itself from the record as made.

WHEREUPON the following colloquy occurred:

"The COURT.—I think they have a right to explain it.

Mr. CLARK.—Yes, but he is asking him if it was not a part, which, of course, would be asking this witness to practically determine this whole question if it was not a part of the claims already presented, if I understood counsel right. Am I right in that, Mr. Stoneman? Certainly we shall object to that."

WHEREUPON defendant's objection was by

(Testimony of C. E. Owens.)

the Court overruled to which ruling counsel for defendant then and there excepted.

THEREUPON said witness was permitted to testify as follows:

"A. This $6,204.62 was the final payment that was due, according to our understanding on the contract on that bridge and this was the demand that we approved and paid.

Q. Now, prior to that time, this demand of November 5 had been presented, hadn't it, and you rejected it? A. Yes, sir.

Q. I am handing the witness Plaintiff's Exhibit 10."

(Being the demand filed by plaintiff against the defendant county on November 5, 1917.)

"Now, isn't it true, Mr. Owens, that the $6,204.65 that was finally paid to Mr. Mesmer on December 3, 1917, was intended to—by the Board of Supervisors to be a compromise and a settlement of all the money that had been demanded by [90] Mesmer & Rice in November or at any previous time?

A. No, sir, I do not understand it that way.

Q. How do you understand it?

A. I understand that $6,240.00 was the last payment due on the contract and the reason that we rejected this thing because there was no evidence there to show us where these things were placed. There is nothing attached to the demand to give us any evidence why we should pay that extra amount.

Q. But you knew that the $6,204.00 which you

(Testimony of C. E. Owens.)

allowed on December 3 was included in the demand of November 5, didn't you?

Mr. CLARK.—Now, we object, because that must appear—

Mr. STONEMAN.—Q. What was your answer?

Mr. CLARK.—Just a minute. That must appear, if it appears at all, from the face of the demands. The statute requires that these demands be itemized and that each item—in each item it shall minutely state what it was for and all that sort of thing. Now, assuming that these gentlemen have followed the law and I presume they did, it will appear from the face of these demands themselves whether the last one on December 3 includes any part of those theretofore presented and rejected. Now, we don't think there could possibly be any other rule.

The COURT.—When was this claim filed, on the same date, December 3?

Mr. STONEMAN.—On the same day. I think about five minutes before it was acted upon.

Mr. LARSON.—This one which he now holds was filed on November 5.

Mr. STONEMAN.—But I thought he had this part that was filed on November 5—

The COURT.—Did you file a claim for that $6,204.00?

Mr. STONEMAN.—How?

The COURT.—Did you file a separate claim for that $6,204.00?

Mr. CLARK.—Yes, sir, it is in evidence here.

(Testimony of C. E. Owens.)

Mr. LARSON.—And that claim was paid in full.

The COURT.—And this is the claim that was filed November 5?

Mr. CLARK.—Yes, sir.

The COURT.—What is the amount of that?

A. $17,776.00.

Mr. STONEMAN.—Q. Now, didn't that claim of November 5 include the amount of money which you admitted that you owed him, $6,204.62? [91]

Mr. CLARK.—That is already objected to and we object to it further on the ground that that calls for a pure conclusion of this witness.

Mr. STONEMAN.—I will change the question, Mr. Clark.

Q. Didn't you so understand on December 3 that that $6,204.62 was included in one or the other—in the demand of November 5?

Mr. CLARK.—That is already objected to. We certainly object to it. An understanding is something so intangible we can't reduce it to this record. It must appear by the face of those demands whether or not the later demand of December 3 was included in any portion of the former, and if the demands were properly made, and I am assuming that they are, they will so show one way or the other.

The COURT.—If this witness knows, why can't he testify to it?

Mr. CLARK.—He asks him to testify to an understanding, which understanding must appear

(Testimony of C. E. Owens.)

from the face of the demands themselves under the legal rule.

The COURT.—Well, the first question was—he asked him if it was not included and it was not part. He changed the question.

Mr. CLARK.—That is the thing that this Court should determine from an inspection of the demands themselves whether it is or not.

The COURT.—Well, I may not be able to determine.

Mr. CLARK.—Then this witness surely, we claim would not have the right, if the demands were put in such shape that this Court could not determine it—we ought not to be bound by the fallacious conclusion, as we think it would be, of any witness.

Mr. STONEMAN.—May it please your Honor, I withdraw that question and ask him questions with regard to the claim of October 1.

Q. The amount of $6,204.00 which you paid to Mr. Mesmer on December 3, 1917, was included in the demand of October 1 or, in this case, Plaintiff's Exhibit 9, was it not?

Mr. CLARK.—That is the same question in slightly different form and we object to it upon the same grounds."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted, and the witness was permitted to answer as follows:

"A. Well, whether that part of it was included

(Testimony of C. E. Owens.)

in that or not, I can't say at the present time but these demands were fixed up in such a way that we as Board of Supervisors did not feel like we nave a right to honor them and, therefore, we rejected them as they was in the whole amount.

Mr. STONEMAN.—Q. Why did you reject the demand of October 1 with the items of the different amounts claimed? [92]

Mr. CLARK.—Well, now, we object to that.

Mr. STONEMAN.—In what respect does not—did it warrant the action of the Board of Supervisors?

Mr. CLARK.—The witness has answered that question once.

The COURT.—He has asked as to November 5 but he has not as to October 1.

Mr. STONEMAN.—That claim of October 1, as your Honor will recall, was deferred—the action on it was deferred until November.

Mr. CLARK.—Yes, that is the record. Now, in the first place, in support of our objection, we say that the witness no supervisor is bound to give a reason for the rejection of a claim; that their reason ought to appear from the claim itself and we say that it does appear plainly on the face of this demand.

The COURT.—I don't know of any rule that would preclude him from giving his reasons. If he knows why the Board acted in the way in which it did, I think he has a right to testify. The objection is overruled."

(Testimony of C. E. Owens.)

To which ruling the defendant then and there excepted and the witness was permitted to testify as follows:

"A. Our reasons for rejecting this demand is the same as the other. There is nothing there to satisfy the Board as to the evidence of these things that were passed on there. There isn't an O. K. there of the inspector or nothing attached to that bill where they incurred that extra expense and we could not honor a demand like that.

Mr. STONEMAN.—Q. Well, you refer only to the extra expense. How about the structural steel, 147 tons at $120.00 a ton, amounting to $17,640.00? what is the objection to that?"

To which question counsel for the defendant objected on the ground that if there was any informality or defect in the demand it was not the fault of the defendant. That if a certain number of tons of steel were charged for in that demand that before the Board could pay it there would have to be a showing somewhere on the demand or by some agency or direction of the County Engineer, showing how much steel would have been required under the contract or under the proposal, so that if the plaintiff had furnished more *more* that would show why demand was made for so many tons of steel. That if this did not appear on the face of the demand, it was not the fault of [93] the Board. Which objection was by the Court overruled, to which ruling the defendant then and there excepted and the witness was permitted to testify as follows:

(Testimony of C. E. Owens.)

"Mr. STONEMAN.—Q. What was the objection to the first item there?

A. Because the demand was not itemized sufficiently and it claimed more money on there than they were entitled to and we demand an itemized demand."

THEREUPON, on the 18th day of March, 1924, the following proceedings were had:

"The COURT.—You may proceed with this Mesmer case.

Mr. CLARK.—Just a minute, if your Honor please, in the matter of Plaintiff's Exhibit 17, which, as I remember it, is the demand that was presented by the plaintiff to the Board of Supervisors or at least to certain members of the Board on the 23d day of May, 1918. I am not sure what objection was made by the defendant to the introduction of that exhibit, if any, and I am, therefore, asking leave to supplement the objection, if any was made, or to let the record show that one was made at this time as follows: First, that the alleged statement or demand is not itemized as required by the statutes of Arizona; secondly, that at the time it was presented there was no indebtedness of any kind or character on the part of Navajo County towards this plaintiff; third, that this claim is not sued upon or mentioned in any way in the complaint, as will appear by reference to page 10 of the amended complaint, wherein it is said that the demand of this plaintiff was presented on or about the 3d day of December, 1917; that there is no showing in the

complaint that this demand was ever presented or filed within six months from the time the alleged claim arose or any item in it; lastly, that it is irrelevant, incompetent and immaterial.

The COURT.—Well, there may be some force to the ground that it was not filed within six months. What do you say to that, Mr. Stoneman?

Mr. STONEMAN.—If your Honor please, as this case has progressed, it has become apparent to me that it will be necessary to ask leave of Court to substitute certain—substitute for certain paragraphs of the complaint other paragraphs to make it conform to the evidence, which I will ask leave of Court after the evidence is in. If the plaintiff is in court at all, he is in court because of the fact that the final action of the Board of Supervisors upon the amended demand was made in December.

The COURT.—Yes, December 3.

Mr. STONEMAN.—On May 23, so that the Board of Supervisors might know the items of the November demand upon which we claim they did act in December, a supplemental claim was made, with the request that it be considered in connection [94] with that demand. That request, the Board of Supervisors, as has been testified to, refused to act upon in any way. They neither accepted it nor did they deny it, nor did they make any record of it at all, so that we are not suing upon the demand as a separate demand as filed on May 23, but we are still suing upon the demand which was theretofore filed, of which we ask that the items in the demand of

November 23 may be considered a part—not admitting but assuming that that would do away with the last possible objection to the demand of November 23.

The COURT.—November 23 or December 3 or May 21 or 23, and I am not clear on the right of a claimant against a county. That claim has been rejected because of its insufficiency to come in several months later and file specifications to revive the claim, especially after the claim or suit on it would have been barred, if it would be barred in this instance. Of course, it would not if your final action was on December 3 or, on your statement that you desire at the close of the case to amend to conform to the proof, of course, if there is any proof in here that is material, the Court would be disposed to allow you to amend to conform to it and the motion—It is a motion to strike.'

Mr. CLARK.—Well, it was a motion really—that probably would be the effect. My request was that the record show that the objection stated this morning be admitted to have been made to the introduction of this exhibit.

The COURT.—Well, I could not entertain—

Mr. CLARK.—Very well, I will put it in the form of a motion to strike upon that ground.

The COURT.—Well, at this time, I will deny your motion.''

To which ruling the defendant then and there excepted and thereupon the plaintiff, to further prove and maintain the said issue on his part, called as a

(Testimony of R. S. Teeple.)

witness R. S. Teeple, who being duly sworn, testified in behalf of plaintiff, and among other things was asked the following question respecting a certain demand said to have been presented by the plaintiff on May 17, 1917, to the Board of Supervisors of Navajo County for the sum of $17,856.00:

TESTIMONY OF R. S. TEEPLE, FOR PLAINTIFF.

"Q. Do you remember seeing a demand presented by Mesmer and Rice on May 17 for $17,856.00 upon which that warrant was paid and shown by what purports to be a carbon copy of a demand, which I hand you?

The COURT.—Is that 1917?

A. Yes, sir. I believe I recollect this, Mr. Stoneman. I can't say as to those figures.

Q. Now, wasn't it upon this demand that that warrant of $10,000.00 was issued? [95]

A. That is my recollection, although a new demand might have been made out.

Q. You recollect that it was this. We offer this in evidence upon the identification of it by this witness and ask that it be marked a separate exhibit."

To which offer counsel for defendant objected on the ground that it was irrelevant and incompetent and that the complaint is not based either wholly or in part upon any demand of May 17, 1917.

THEREUPON Mr. Stoneman, for plaintiff, made the following explanation:

(Testimony of R. S. Teeple.)

"Mr. STONEMAN.—It is offered not for the purpose of that—that purpose at all. It is offered for the purpose of showing that the Board of Supervisors has, at least in this instance, made an allowance upon—without a separate demand covering the amount allowed being presented."

WHEREUPON the objection to the offer of said evidence was by the Court overruled, to which ruling counsel for defendant then and there excepted, and said purported demand was admitted in evidence and marked Plaintiff's Exhibit 19, which is hereto attached, properly marked and numbered for identification and is hereby referred and asked to be considered as a part hereof.

THEREUPON, upon cross-examination of the same witness, who testified, among other things, as follows:

"Mr. CLARK.—But I am asking you if the demand was not accompanied or if there was not along with it an estimate of the engineer or inspector as to the amount—proportionate amount due Mesmer and Rice on their contract?

A. There might have been a written estimate, Mr. Clark, or there might have been a verbal advice on that matter. My recollection is that the Board did not make any payment to Mr. Mesmer except on either written or oral advice of their engineers.

Q. Yes, and when you say advice, do you mean advice as to the amount of labor or material furnished, so that the Board could get some idea of

(Testimony of R. S. Teeple.)

how much was due under the contract; is that the idea? A. Yes, sir. [96]

Q. And was that the custom throughout until the final payment on December 3, 1917? A. Yes, sir."

THEREUPON, respecting the demand of plaintiff against Navajo County, dated December 3, 1917, counsel for defendant asked the witness the following questions:

"Q. Now, calling your attention, Mr. Teeple, to the line starting with the word 'less' purporting to be credits on this demand, opposite which is a total of $17,000.00, as I remember it?

A. Yes, sir, $17,600.00.

Q. $17,600.00 is right. Now, I will ask you if that amount does not include all payments of every kind and character theretofore made by the Board of Supervisors to the plaintiff on this bridge?

A. It was so intended.

Q. I am asking you if it does not?

A. It does, yes."

WHEREUPON counsel for plaintiff moved that said answer be stricken out for the purpose of making an objection, which motion was by the Court sustained.

WHEREUPON counsel for plaintiff objected to the question on the ground that the witness was not qualified to answer. Which objection was by the Court sustained, to which ruling the defendant then and there excepted.

THEREUPON after said testimony had been given by said witness as to additional work done

(Testimony of R. S. Teeple.)

upon the bridge in question by the county in order to complete it, the following proceedings were had:

Mr. STONEMAN.—I move that the entire testimony of this witness on examination of Mr. Clark be stricken, upon the ground that it is contrary to the record made in this case, in that the record shows in this case that the plaintiff's claim the payment of $6,204.00 in final acceptance and payment of all demands upon the construction of that bridge and that it is incompetent for the purpose of disputing the record that the Supervisors did accept the bridge and finally paid for it.

The COURT.—Yes, any work that was done after the completion of the contract by Mesmer & Rice would be immaterial, unless it was a claim here that they had failed to perform [97] the contract, and there is no such claim.

Mr. CLARK.—There is no such claim.

The COURT.—Well, the motion is granted and the evidence may be stricken."

To which ruling of the Court the defendant then and there excepted.

THEREUPON the plaintiff, to further prove and maintain said issue on his part, called as a witness the plaintiff, Louis F. Mesmer, who being duly sworn, testified in his own behalf, and among other things was asked the following questions, as to the conversation alleged to have occurred about August 8, 1916, and prior to the execution of the contract in question which was made on September 5, 1917, said conversation purporting to have been made with Mr. C. E. Perkins, County Engineer:

TESTIMONY OF LOUIS F. MESMER, FOR PLAINTIFF.

"Mr. STONEMAN.—Now, then, what conversation, if any, led up to the —— and what reasons were there why the payment for the additional work suggested by the County Engineer should not be included in the $23,800.00? In other words, I mean why was it the provision put in there that the substructure should be constructed according to the *addenda* rather than that it should come out of the $23,800.00?"

To which question counsel for defendant there and there objected on the ground that it involved an executive matter, something that could only be determined by the Board of Supervisors and anything that the County Engineer may have said as to that could not be binding upon the defendant at all. That it was incompetent for the purpose offered or for any purpose.

"The COURT.—No, but it may be leading up to a question that is.

Mr. CLARK.—Nevertheless, your Honor, we do not think it ought to go in, for the reason stated. It is incompetent for the purpose offered or any purpose.

The COURT.—Q. This was the engineer in charge of the work for the company, you say?

A. This was an engineer. He was County engineer and the County Board referred these plans and specifications to him.

(Testimony of Louis F. Mesmer.)

The COURT.—The objection is overruled.

Mr. CLARK.—We will note an exception.

Mr. STONEMAN.—Q. Now, then, was there any discussion as to the reasons why the changes contemplated should not be paid for and included in the lump sum of $23,800.00 that you [98] said you would construct the bridge for under the original plans and specifications?

Mr. CLARK.—We make the same objection, your Honor. That is an executive matter that could only be settled by the Board.

The COURT.—Yes, but it is merely a discussion. The objection is overruled. You may have an exception.

Mr. CLARK.—Yes, we will take an exception.

A. The original plans provided, for instance, that the end cylinders would be thirty-three inches in diameter and have two piles in each cylinder and filled with concrete twenty-one feet long. The alteration, for instance, in the end cylinders, substituted for a thirty three inch cylinder a seventy-two inch cylinder, one that was thirty feet long instead of twenty-one feet long, one filled with seven piles driven to a fifteen ton refusal and piling requiring thirty foot of length as against the original one which only required two piles. Understand, in the original plans, two piles and they were increased to seven. Originally, the cylinder was twenty-one feet long and the new cylinder was thirty feet long. The diameter of the original cylinder was two foot nine

(Testimony of Louis F. Mesmer.)

inches and the diameter of the final cylinder was seventy-two inches, a very material difference."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted.

THEREUPON said witness was asked the following question:

"Mr. STONEMAN.—At that time did Mr. Perkins say anything to you about the possibility of further changes by reason of the requirements that might be made by the representative of the Indian Department?"

To which question counsel for defendant then and there [99] objected on the ground that additional quantities required before the contract was made and signed, and particularly before any construction had started, were immaterial. That they were not matters which come within what counsel calls *addenda* for the reason that all of these things to which the witnes has just testified as being additional quantities and sizes set forth in the proposal are in terms cited in the contract. That the plaintiff is to furnish each one of these things which have been mentioned and which are mentioned in the report of the County Engineer and the report of Mr. Nichols. The other reason is that the *addenda* to which counsel has referred to has this provision and it is in the contract as well as in the proposal: "If, after construction has commenced it appears that additional quantities are required, they shall be paid for as follows," and that the contract itself

(Testimony of Louis F. Mesmer.)

provides that the *addenda* shall only become effective after construction is commenced, if it be apparent that additional quantities are required.

Which objection was by the Court overruled; to which ruling the defendant then and there duly excepted, and the witness was permitted to testify fully as to the matters embraced in the question.

THEREUPON counsel for plaintiff asked of said witness the following question:

"Mr. STONEMAN.—Well, what influence did it have and why was the phrase 'as per *addenda* for extras upon proposals accepted' inserted in the contract as finally signed, in so far as the substructure work was concerned?

A. So that any alterations made in the substructure other than—over those that were shown on the original plans would be paid for as per the unit prices shown in the *addenda.*"

THEREUPON counsel for defendant moved to strike said answer on the ground that the answer was a conclusion by way [100] of interpretation of the contract which forestalls the Court in its construction. That the contract was clear and plain and unambiguous. Which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREUPON the following question was asked of said witness by counsel for defendant:

"Mr. STONEMAN.—Was there any attempt by either you or Mr. Perkins at that time to reach a figure as to what additional money would be re-

(Testimony of Louis F. Mesmer.)

quired to construct the bridge according to the suggestions of the County Engineer?

A. Yes, the quantities, the cubic yardage of concrete was figured, the number of extra piles was figured the amount of reinforcing bars was figured, the amount of structural steel required was figured and all of the various items that go to make up the alterations were estimated and they were added on to the contract price of $23,800.00 and then that amount subtracted from the total amount of $28,000.00—figured 28,000 and some odd plus 15,000, to see whether those alterations from the total cost was inside of the available money for the work."

THEREUPON counsel for defendant stated that said answer was wholly unanticipated and moved to strike the same because it was irrelevant, incompetent and immaterial, which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREUPON said counsel for plaintiff offered in evidence a certain blue-print for the purpose of showing changes in the substructure of the bridge, to which offer counsel for the defendant objected for the reason that it was incompetent, irrelevant and immaterial and not one of the plans or drawings attached to the contract and which did not seem to have entered into the contract in any way.

Which objection was by the Court overruled, and said blue-print was admitted in evidence and marked

(Testimony of Louis F. Mesmer.)

Plaintiff's Exhibit No. 20, to which ruling of the Court defendant then and there excepted.

THEREUPON the examination of said witness, Louis F. Mesmer, the plaintiff, continued, and among other things the following proceedings were had: [101]

"Mr. STONEMAN.—Did you prepare or cause to be prepared any further plans showing the difference between the plans and specifications upon which your bid was submitted and the plans and specifications upon which it was agreed the substructure should finally be built which showed the changes?

A. I had Mr. Popert prepare the plan that you have in your hand there. I did not prepare it myself. Mr. Popert prepared it for me. Mr. Popert of the American Bridge Co. prepared it for me.

Q. Are these the plans that you have testified to as showing the changes in the substructure from the plans of construction of the substructure that was included in your bid?

A. They are. They show the difference between the two river piers on the original plan as proposed and as built.

Mr. STONEMAN.—We offer this in evidence and ask that it be marked Plaintiff's Exhibit 21."

To which offer the defendant then and there objected on the ground that it does not appear from anything the witness has stated that the offered plan is anything more than one prepared by Mr. Popert. That it does not show that the County Engineer had anything to do with it.

(Testimony of Louis F. Mesmer.)

WHEREUPON the Court made the following observation:

"The COURT.—No, it does not show it was submitted to him or made with his approval or changes were suggested—

Mr. STONEMAN.—It is not offered for that purpose, if your Honor please. It is offered for the purpose of in a little while of forming the basis of the computation of the extra cost under the flat charges of the additional steel and concrete in place required by the changes.

The COURT.—You expect to show that the work was done in accordance with these plans and changes?

Mr. STONEMAN.—Yes, sir."

WHEREUPON counsel for defendant added to its objections that it would then be purely self-serving and not under the authenticity or approval of the County Engineer or anyone else who might bind the county, and would be in the nature of hearsay as well as incompetent.

WHEREUPON the following proceedings were had:

"The COURT.—Was it submitted to the County Engineer? [102]

Mr. STONEMAN.—No, sir.

WITNESS.—No, it was just—it was an attempt to show in a picture just what the changes actually were. We have a picture of it showing the original and the revised on the other—it is a picture—an illustrative sketch more than anything else.

(Testimony of Louis F. Mesmer.)

Q. For your own use?

A. For our own use.

The COURT.—You followed it? A. Yes."

WHEREUPON the objection of defendant as above stated was overruled, to which ruling the defendant then and there excepted and said drawing was admitted in evidence as Plaintiff's Exhibit No. 21, and the witness was permitted to testify fully regarding the same and the computations based thereon.

THEREUPON the examination of said witness was continued by plaintiff, the following question, among others, was asked:

"Mr. STONEMAN.—In answering the next question, I will ask you, please, always, in each instance, Mr. Mesmer, give the cost first of the construction under your own plan and specifications and then give the added cost as shown by the changes required by the County Engineer, if you can do that."

To which question counsel for defendant then and there objected to any comparison between the cost of the bridge as originally proposed by that, meaning the proposal which is attached to the contract in evidence, and the bridge as finally built. (Counsel stated that they did not object to any comparison as to the cost between the substructure as described in the complaint and the cost of the substructure as finally completed and put in by plaintiff.)

(Testimony of Louis F. Mesmer.)

The ground of objection to any testimony showing the comparision of cost between the original proposal and the bridge as finally built was stated to be that in the contract there is a certain substructure, definitely and specifically [103] provided to be built by the plaintiff for Navajo County, and that the words in the contract: "substructure to be as follows: as per *addenda* for extras upon the proposal accepted" refer only to extras beyond the substructure that is definitely contracted to be built in the contract, no part of which is designated as an extra. Further that the provision as to extras has no application except the things in the nature of an addition to the contract—after actual construction shall have commenced. That the objection extends to everything else in the way of a comparison of costs on the ground that it is immaterial and that the contract does not cover any so-called extras.

Which objection was by the Court overruled, to which ruling the defendant then and there excepted and the witness proceeded to testify fully to comparative cost.

THEREUPON the examination of said witness was continued by the plaintiff, and the following proceedings were had:

"Mr. STONEMAN.—Q. Are there any other items of extra cost to you that you have not mentioned?

A. Well, the items— The items which read as follows: Extra work and material required by the

(Testimony of Louis F. Mesmer.)

inspector as follows: Drilling holes, reinforcing steel amounting to 1988.4 pounds, and labor furnished the engineer, these amount to $195.62.

Mr. CLARK.—Q. In order that we may know about that, now, aren't those items included in the demand of December 3, 1917—these three last ones —drilling holes— A. Yes.

Mr. STONEMAN.—Just give me an opportunity and I will give you credit for those.

Q. The last three items of $27.14, $138.08 and $31.04 have been paid have they not?

A. Yes, sir.

Q. And they were included in the amount which you claim under the demand of November 5, 1917?

Mr. CLARK.—December 3, Mr. Stoneman.

Mr. STONEMAN.—Q. Were they not?

A. I don't know whether there was any additional work carried on by the inspector after November 1. There may have. It may have all been and never claimed but I would not remember whether there was any work—additional work required by the County Engineer after November 1 or the Government—the [104] county inspector.

Mr. CLARK.—If the Court please, the demand of November 5 does not show any of those items as such, at least. I have it before me here and it does not show anything of that kind or anything that seems to resemble it. There is one general charge there for extra work—material and work of $12,800.00, without any itemization or itemizing.

(Testimony of Louis F. Mesmer.)

The COURT.—Q. Probably included in that item?

A. I think that they were.

Mr. CLARK.—Well, we would not like to be bound by that suggestion that it is included, unless there is something—

The COURT.—No, not unless you know.

A. Well, they were included, unless there was some work done at the request of the inspector after November 1 but I don't think that there was any work, your Honor. The inspector is here and he can speak for himself. I don't think so.

Mr. CLARK.—The point I am making, your Honor, it is hardly likely it would be in the demand of December 3 items if they were included in the demand of November 5. It would be a reasonable inference.

The COURT.—Q. When did those items accrue?

A. During the progress of the work.

Q. You are not able to say just when?

A. I am pretty sure they were all involved in the foundations.

Q. In the early part of the work? A. Yes, sir. Omitting several questions the following proceedings were had:

"Mr. STONEMAN.—Q. Were you present at the meeting of the Board of Supervisors on November 5—December 3 I mean? A. I was.

Q. Where did you spend the day in Holbrook?

A. I spent it in the office of the Board of Supervisors. I was arguing over the—

(Testimony of Louis F. Mesmer.)

Q. At Holbrook? A. The extras. Yes.

Q. Were you arguing over the—What demand were you arguing over, the demand of November 5?

A. The plans?

Q. Demand. [105]

A. I was arguing over the extra work involved in the plan of November 5.

Q. Do you mean the plan or the demand?

A. The demand. Arguing over the extra work. I spent all day arguing over the extra work.

Q. Did the county make any allowance on December 3 of the amount claimed by you under the demand of November 5?

A. We were arguing all day on the—

Q. I wish you would tell the Court just exactly what happened that day.

Mr. CLARK.—If the Court please, we object, because this witness has answered that question and stated that he was unable to say. That was asked, your Honor, a few minutes ago, whether this demand of November 5 included this one hundred ninety-five dollars and some odd cents they were talking about as having been paid in the demand of December 3.

The COURT.—This is a different question. Now, he asks him what happened. He asks him to state what happened.

Mr. STONEMAN.—Q. Well, start in on the morning of that day and tell the Court, as far as you may be permitted to tell, what happened and

(Testimony of Louis F. Mesmer.)

what was done between you and Mr. Popert and the Board of Supervisors.

Mr. CLARK.—Before the witness starts this, we shall object to it on the ground that the plaintiff is precluded as we say, by the receipts, which is a final one, and by his undertaking of the indemnity given on that date and by all of the circumstances surrounding this case. We say that that receipt constitutes or that demand and the warrant for its payment constitutes a full and final payment of all demands."

Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to restate fully his version of what happened before the Board of Supervisors on December 3, 1917, as follows:

"Mr. STONEMAN.—Q. What did you argue about? Can you say all that happened all day long in two sentences? Start in at the beginning and tell what happened and what was done and what the subject of it was and, as near as you can, what was said between you and the Supervisors?

A. Well, we argued over the question of the extras involved by reason of the changes covered by Perkins, by Mr. Merritt's request and by the Engineer's request—the representative of the county on the job. The county absolutely refused to consent in any way to making us an allowance by reason of any of the changes made in the plans at the request of Mr. Perkins embodying Mr.

(Testimony of Louis F. Mesmer.)

Nichols' recommendations. They agreed to pay for the extras involved on the job by reason of the inspector, this $195.00 item; they agreed to pay for the changes involved in the plans by reason of the incorporation of Merritt's request.

Mr. CLARK.—I would like to have the conversation stated as nearly as we can.

The COURT.—Yes, if you can remember the conversation. [106]

Your Honor, there were three supervisors present, and we had a kind of a round robin there. We talked all day over this thing and I am just trying to sum up into a kind of a conclusion as to what was said after the whole day's argument.

Mr. STONEMAN.—Q. Now, what was the subject of the argument? A. Extras.

Q. The demand that you had previously put in in November?

A. Yes, it was the extras that were involved—I had extra in our November demand and this—November 5—I will repeat it again. This November demand, they finally said, 'We will allow this—we will allow the expenses incurred by reason of the changes made at the request of our inspector, first. Second, we will allow the changes in the plan as made at the request of Merritt. Third, we will not allow anything on the changes made in the plan as embodying Perkins' recommendations and Nichols' report as carried out.' Well, we quit at 5 o'clock and I went over from there to Perkins' house.

(Testimony of Louis F. Mesmer.)

Q. And, in the meantime, you had not received any money out of the November demand?

A. No, sir, they would not give me any money and, in order not to disturb my equities, I refused to go on that basis. I then went over to Perkins' house with Mr. Popert and I saw there some of the original calculations involving the extras involved by reason of these changes carried out by the unit prices as per *addenda;* I saw Merritt's letter covering these—requesting these changes and I saw the rough parts of the paragraph covering the substructure and I then went over to Mr. Larson's house and we had—with Mr. Popert and talked with him a little bit and I asked him if there was not some kind of a way of getting out of this thing—I was in desperate straits—and he thought probably there was, and, at his suggestion, we came back—we decided to go back and have another round robin in the evening after the Board convened and we talked again. I told the Board that I would not accept any demand on Merritt's alterations but I would accept the pay for the balance due to make—to complete the original plans and I would accept the additions involved by reason of the inspector on the job. The Board drew up a warrant which was finally on that basis and I left in a huff and went to the station and said 'I am through. I can't do business—'

Q. You say it was final?

A. I will give you the—

Q. Give you 11 and 12?

(Testimony of Louis F. Mesmer.)

A. 11 or 12, one of those.

Q. I hand the witness Plaintiff's Exhibits 11 and 12.

A. The county drew up the Exhibit 12 and I refused to sign this, because it was—because stated for full payment of contract of Winslow Colorado Bridge and I left in a huff and went to the station. When I was there, Mr. Popert says: 'Here, I represent the American Bridge Co. We have got to have some money. I am going back there as a representative of the American Bridge Co. and see if we can't reach some compromise with the Supervisors,' so he went back and had a talk and about an hour or half an hour afterwards, he came back and he says: 'Now, be reasonable, Mesmer. Come on over there and we will talk this thing again,' so I went back again and after considerable argument, in which Mr. Freeman said he was perfectly willing to give me a thousand dollars for my extra foundation but that is as far as he would go and which I said I could not accept, we finally drafted this No. 11—Exhibit 11, wherein it specifically stated just what the $6,204.62 covered. It specifically left out Merritt's alterations. [107]

Mr. CLARK.—Isn't that matter appearing on the face of the demand and it doesn't need any elaboration by the witness? It speaks for itself.

The COURT.—It probably does but he has already testified to it.

A. The reason that I insisted on leaving out Merritt's alterations, over which there was no con-

(Testimony of Louis F. Mesmer.)

troversy and never was any controversy, because that I did not want to embarrass myself by putting the claim with the county—which the county contended was not relevant, in which the claim that they had admitted to be correct. They signed the draft as drawn up and the warrant was drawn for the amount. Before, however, the warrant was drawn, Mr. Larson, District Attorney, drew up a formal release in which I agreed to save the county harmless for all liens of labor or any kind of bills that might be incurred and he turned around to Mr. Popert and asked him if he was satisfied he could get his money out of me; that he owed me the money; and when he told him he thought he would take a chance, they drew a warrant and signed it and I left."

THEREUPON said examination was continued and the following question, among others, was asked of the plaintiff:

"Mr. STONEMAN.—Now, was there at that time any discussion of any claim which you had made against the county, except the claim embodied in the demand of November 5?"

To which question counsel for defendant then and there objected, which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON the examination of said witness was continued and the following question, among others, was asked: [108]

"Mr. STONEMAN.—Q. Wasn't the matter be-

(Testimony of Louis F. Mesmer.)

ing discussed between you and the Board of Supervisors, as to whether or not the Board of Supervisors should pay the whole of the claim as it was included in the demand of November 5 or whether they should pay part of it or whether they should stand upon their original rejection of the whole claim?"

To which question counsel for defendant objected upon the ground that it was leading. Which objection was by the counsel for plaintiff then and there confessed, following the comment of the Court that it was leading. Nevertheless, the objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. The Board would only pay the amount necessary to complete the original plans and specfications, and they agreed to pay the other extras with the exception of the Nichols—or the Perkins' extras, which they would not pay, so that the money that they allowed was in—was an application of first—on the former.

Q. Well, what I want to know, what was being discussed; was it a previous demand or was it?

A. Yes, we were discussing the extra work involved in November—in the November discussion. All of the extra work had been completed before.

The COURT.—Q. November claim?

A. Yes, the extra work had been completed then.

Mr. STONEMAN.—Was the amount of $6,-204.62, which you finally accepted on December 3,

(Testimony of Louis F. Mesmer.)

an amount that was included in the November demand?

A. Well, part of it was, yes."

THEREUPON said witness was further examined in behalf of plaintiff, and the following question, among others, was asked:

"Mr. STONEMAN.—Q. Do you know why the words, 'together with extras herein listed' was placed in there?

A. In order to—"

To which question counsel for defendant then and there objected on the ground that it called for a conclusion and that the instrument itself is susceptible of easy interpretation. [109]

"Mr. STONEMAN.—The witness says that he directed that to be put in there.

Mr. CLARK.—I understand that he did.

The COURT.—Yes, but the instrument itself does not show why that language was used. I think it is proper evidence in explanation of the document. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Yes, the reason for that wording was to differentiate the extras mentioned and specifically enumerated here from the Merritt extras or the extras involved by reason of changes in the plans at the specific request of Mr. Merritt of the Indian Department and the extras involved by reason of

(Testimony of Louis F. Mesmer.)

the changes in the plans at the suggestion of Mr. Perkins.

Mr. STONEMAN.—Q. Did you make any statement to the Board of Supervisors, either at the time or immediately before you signed this demand, as to the reservation of any right that you might have to sue for any amount exceeding the amount of $6,204.00?

Q. What did you say and who did you say it to?

A. Told the whole Board that I reserved the right to sue for the extras involved by reason of the changes in the plans covered by Merritt's extras or the Indian Department extras and the changes in the plans by reason of the incorporation of Perkins' requests.

Q. Do you know whether at that time there was any reference to the extras as being included in the November 5 claim?

A. State that question again. (Question read.)

Q. Those extras that you reserved the right to sue for.

A. They were all included in the November 5 claim.

Q. Did the Board understand—did you say anything to the Board identifying the extras that you claimed the right to sue for as being the extras included in the November 5 demand?

A. That was what we were talking about all of the time, the extras involved in the November 5 claim, yes, sir. The extras of the November 5

(Testimony of Louis F. Mesmer.)

claim was the only subject of dispute or ever was in dispute.

The COURT.—Q. That is all that you are suing for? A. Yes, sir.

THEREUPON, on the 19th day of March, 1924, the examination of the plaintiff, Louis F. Mesmer was continued, and he was asked the following question, among others:

"Mr. STONEMAN.—Q. Isn't the contract, Mr. Mesmer, in [110] that clause of it you have testified to as incorporating the changes from the original specifications, as required and suggested by Mr. Perkins, after the Nichols report was filed, different specifications in that—are the specifications in that clause of the contract sufficient to show the weights of the cylinders and all that different thing?"

To which question counsel for defendant then and there objected on the ground that the specifications are the best evidence.

THEREUPON the following proceedings were had:

"The COURT.—Well, do they show weights and dimensions? A. No, they do not, your Honor."

WHEREUPON said objection of the defendant was by the Court overruled, to which ruling the defendant then and there [111] excepted and the witness was permitted to testify fully as to what the specifications did not show.

THEREUPON said witness upon further ex-

(Testimony of Louis F. Mesmer.)

amination in behalf of plaintiff was asked the following question, among others:

"Mr. STONEMAN.—Q. Could you have constructed the bridge for the sum of $23,000.00 under the original plans and specifications upon which your bid and proposal was based?

A. Yes, sir.

To which question counsel for defendant then and there objected upon the ground that it was immaterial. Whereupon the following proceedings occurred:

"The COURT.—Well, it is already answered. The objections will be overruled."

THEREUPON counsel for defendant moved to strike the answer upon the same ground as stated in support of the objection, which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREUPON, and during the cross-examination of said witness, Lewis F. Mesmer, by counsel for defendant, the following question was asked, among others, of said witness:

"Mr. CLARK.—During the or at the close rather of the conversation there and after the warrant was issued or at the time it was issued on December 3, 1917, you said that the Board asked you to make up some kind of a contract or agreement of indemnity?

A. Well, they—when they would give us the $6,204.62 they stated it would be necessary for us to give them a full release for material or labor bills.

(Testimony of Louis F. Mesmer.)

Mr. CLARK.—Q. Didn't they also say a full release so far as all demands were concerned?

A. All labor and material demands, yes. Any bills that were outstanding by reason of our construction.

Q. No, but didn't they say a full and complete release of every kind of a demand that you might have in connection with the construction of that bridge?

Mr. STONEMAN.—I object to that.

A. No.

Mr. STONEMAN.—Just a minute. I object to the question [112] if your Honor please, as an attempt to contradict the receipt itself. The receipt itself—

The COURT.—Well, I don't know.

Mr. STONEMAN.— —as being the best evidence.

The COURT.—I haven't seen the receipt.

Mr. STONEMAN.—The receipt that Mr. Clark — oh, this is another one.

Mr. CLARK.—This is not a receipt. This is the contract of indemnity that I am talking about.

Mr. STONEMAN.—Is it in evidence yet?

Mr. CLARK.—Not yet, no, sir. I am just leading up to it now, and I have asked the witness a question which I will ask the reporter to read.

(Question read.)

Mr. STONEMAN.—Now, if your Honor please, we object to it on the ground that if the

release itself is in existence that it would be the best evidence as to what it means.

The COURT.—Yes, I think it would.

Mr. CLARK.—While we agree with that, your Honor, but we think, in view of the fact that this has become largely a matter of intention and the evidence on both sides has taken a wide range as to that, we think the understanding under which this particular instrument was executed is as material, at least, as any of the rest of this.

The COURT.—Suppose the conversation showed that it was not with that intention but the indemnity showed that it was, the conversation would be immaterial.

Mr. CLARK.—We intend to show—we avow that we expect to show by our witnesses that this indemnity contract that I am speaking about was executed upon the understanding that there had been and that this was said in confirming the understanding that this $6,204.00 and some cents constituted a complete and final settlement between the parties of all demands. That is what our witnesses will testify to, as we avow."

WHEREUPON plaintiff's objection to said question was by the Court sustained, to which ruling the defendant then and there excepted.

THEREUPON, upon redirect examination of the same witness, Louis F. Mesmer, by counsel for plaintiff, the following question, among others, was asked, of said witness:

(Testimony of Louis F. Mesmer.)

"Mr. STONEMAN.—Mr. Mesmer, can't you put the conditions under which you state that you were paid $6,204.00 by the Board of Supervisors on December 3, 1917—Will you please state to me again your understanding of the conditions under [113] which that payment was made and how you accepted it?"

To which question counsel for defendant objected on the ground that it was not proper redirect; that it has been fully stated by this witness more than once what his understanding was in both direct and cross-examination. That he was asked for all of the conversation and the transcript of the reporter's notes would show that. That to ask the witness for his understanding is to ask for a conclusion and is therefore objected to on that ground as well as that it is not redirect.

THEREUPON the following proceedings were had:

"The COURT.—Well, he can testify as to what he understood at the time—what he understood as to the terms of the—

Mr. CLARK.—We add to our objection that there is not any ambiguity, as we view it, in the contract and that it is susceptible of easy interpretation and speaks for itself."

WHEREUPON said objections were by the Court overruled, to which ruling defendant then and there excepted and the witness was permitted to testify as follows:

"A. The Board—I will give in conclusion this

(Testimony of Louis F. Mesmer.)

thing: The Board said to me as follows: 'We will give you the difference between the amount of 23,-800.00 and the amounts we have already paid you, and in addition thereto, we will give you the Dubree extras and we will give you the Merritt extras, but we won't give you the extras involved by reason of Perkins' changes,' and I said, 'Gentlemen, that won't do. I will tell you what I will do. I will take the difference between $23,800.00—'

Q. $23,000.00?

A. Yes. '—and what you have already paid me and the Dubree extras, but I won't take the Merritt extras, because it will cloud the question of the Perkins' extras, which are involved with and a part of, you might say, of the Merritt extras. It is difficult between the two lines to draw just where Merritt's and Perkins' come together."

THEREAFTER, after the examination of said witness had been concluded, the following proceedings were had:

"Mr. CLARK.—Before any further testimony is put on, we desire to move that all of the testimony of Mr. Mesmer as to the value of these extras claimed by him be stricken on the [114] ground: First, that all of those things that he set forth of what was required by the Indian Department are provided for in the contract itself; secondly, on the ground that no demand covering these extras, as testified to by Mr. Mesmer, was filed with the County of Navajo in the manner and form as required by

the Statutes of Arizona within six months from the date of the last item.

The COURT.—You refer to the detailed statement now?

Mr. CLARK.—The detailed statement that he made last was for some $14,000.00 excepting so much of that as relates to changes made by the Indian Department, as the proof may finally appear as to the value of those and, in that connection, we remind your Honor that the witness testified that nothing was put in during the month of November excepting hand rail and some extra drilling and certain painting work and that is all that was done. In other words, that was all on the superstructure. All of these other improvements go to the substructure and on the further ground that under the *addenda* clause, as claimed by the plaintiff himself, none of those things were required or done after construction had commenced.

The COURT.—Well, now, what do you say as to the proposition of the Board entertaining a claim that does not contain a detailed statement that the statute seems to require and passing upon it and allowing a part of the claim? Don't they waive that?

Mr. CLARK.—If the Court please, that might have some forcibility to that, if it were not for the fact that in the final statement that was presented on December 3, 1917, the plaintiff himself says that those prior payments were made upon the contract

(Testimony of W. H. Popert.)

price and not upon any extras. They show it upon the face of the demand.

The COURT.—The testimony shows that in the claim of $6,204.62 allowed on December 3, 1917, a part of that claim included extras.

(Further discussion.)

The COURT.—I think, perhaps, if the Board had directly ignored that claim and made no allowance on it and refused to consider it, on the ground that it was not properly itemized there might be some force in the argument, but they took that claim up and they considered it and they went into it in detail and they had to do that in order to segregate the number of extras that were allowed in the warrant for $6,204.62. The motion will be denied."

To which ruling the defendant then and there excepted.

THEREAFTER, further to maintain and prove the said issue on his part, the plaintiff called as a witness W. H. Popert, who being first duly sworn, testified in behalf of the plaintiff, and was asked the following question, among others:

TESTIMONY OF W. H. POPERT, FOR PLAINTIFF.

"Mr. STONEMAN.—Could the bridge have been constructed for $23,800.00 exclusive of these modifications?" [115]

To which question counsel for defendant then and there objected on the ground that it was immaterial,

(Testimony of W. H. Popert.)

which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON the witness answered as follows:

"A. The bid calls for a construction of a bridge in the amount of $23,800.00, using the materials as called for on design No. 4183. The modifications suggested in the Nichols report and as agreed to by Mr. Perkins did involve considerable material more than that show on drawing No. 4183."

THEREUPON counsel for defendant moved to strike said answer on the ground that it was not responsive. Whereupon the following proceedings were had:

"The COURT.—The question was, could it be built for $23,800.00 as modified?

A. The cost to Mesmer & Rice would have been—I mean involving—including the modifications as desired by Nichols and Perkins would have been considerably more than $23,800.00."

Which answer defendant then and there moved to strike on the ground that it is not responsive. Thereupon the following proceedings were had:

"The COURT.—No, the question is, could the bridge as modified by the plans acceptable to the Indian Department be built for the $23,000.00—$23,800.00 specified in the contract? Is that the question?

Mr. STONEMAN.—That is the question.

A. My answer is no."

To which answer counsel for defendant renewed the motion to strike adding the ground that it was im-

(Testimony of W. H. Popert.)

material, which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREAFTER, and during the same examination of said witness on behalf of plaintiff, the following question, among others, was asked of him:

"Mr. STONEMAN.—Q. Now, with reference to the phrase [116] as it appears in the contract by Plaintiff's Exhibit 3, 'substructure to be as follows: as per *addenda* for extras upon the proposal accepted.' Do you know how that phrasing happened to be inserted, not only in this memorandum, being Defendant's Exhibit 'A,' but finally in the contract? Do you know? Say yes or no, please.

A. Yes, I know.

Q. Now, go ahead and tell the reason why."

To which question the defendant then and there objected on the ground that it was immaterial, which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. As I remember, in the original pencil draft, of which this is, I believe, a copy, we wanted to be sure that any materials to be furnished above that show on the original blue print and called for in the original proposal should be paid for irrespective of the description which might follow after here. I can't say whether I inserted this or the engineer or the attorney but it was agreed upon at that time in the conference that these words should appear in the contract or words similar in effect which

(Testimony of W. H. Popert.)

would be satisfactory to the County Attorney. Does that answer the question?"

THEREUPON the following question was propounded to said witness by counsel for plaintiff:

"Mr. STONEMAN.—Is there any reason why it was not possible at that time to say that the bridge should be built for $23,800.00, or for any other sum?"

To which question the defendant then and there objected as calling for a pure conclusion, and as covering matters already testified to by this witness, which objection was by the Court overruled, to which ruling the defendant then and there excepted, and said witness was permitted to testify as follows:

"A. The proposal called for the construction of a particular bridge for a particular price. It was known that there would be certain modifications to be made. It was not possible to anticipate those modifications before the contract was executed. Further, the contractor believed that it would not be legal to modify the price named in the original proposal."

Thereupon the following question was propounded to said witness by counsel for defendant: [117]

"Q. Was there any discussion between you and Mr. Mesmer and Mr. Perkins, the County Engineer, as to the meaning of the phrase "substructure as per *addenda* for extras herewith?

A. There was discussion.

Q. What was said?"

(Testimony of W. H. Popert.)

To which question counsel for defendant then and there objected on the ground that it was immaterial, that being a legal matter and could not bind the County of Navajo. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"Mr. STONEMAN.—What was said and who said it and what was discussed?

A. Well, in order to save the time, I will make my answer as brief as possible. The sum and substance of the discussion was that if there should be any alterations—any additions to the original plan and bid that they should be paid for as provided by the proposal."

THEREUPON the following question was propounded to said witness by counsel for plaintiff:

"Mr. STONEMAN.—Was there any question at that time expressed by Mr. Perkins—any claim by him that Mesmer & Rice were to construct this bridge with these changes suggested by him for the sum of $23,800.00?"

To which question the defendant then and there objected as leading and immaterial, which objection was by the Court overruled, to which ruling the defendant excepted and the witness was permitted to answer as follows:

"A. I will say that the understanding was that whatever additional material was required to that called for in the original plan and bid would be paid for."

(Testimony of W. H. Popert.)

THEREUPON the following question was asked of said witness by counsel for plaintiff:

"Mr. STONEMAN.—Did Mr. Perkins say anything to you before the contract was signed as to whether or not he understood that the substructure commencing in the paragraph of Plaintiff's Exhibit 3, being the contract where 'substructure' is used, where to be paid for at the unit prices or were to [118] be paid for as per *addenda* for extras or were to be paid for out of the flat sum of $23,800.00?"

To which question counsel for defendant then and there objected on the ground that it called for a conclusion and hearsay and was immaterial, which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. In a few words, the extra material as roughly described in contract for the substructure, extra material over that show on the blue print, 4183, should be paid for at the unit prices specified in the proposal. Well, I am trying to save my words and time as much as possible."

THEREUPON the following question was asked of said witness by counsel for plaintiff:

"Mr. STONEMAN.—Have you made a calculation, Mr. Popert, of the different items of materials used in the substructure for the purpose of showing the cost of the substructure based upon the prices used in the contract under the *addenda* clause. Have you made a calculation, yes or no?

(Testimony of W. H. Popert.)

A. Yes, I have.

Q. Will you read into the record the result of that calculation. A. May I refer—

Q. Have you made some notes for that purpose?

Mr. CLARK.—Are you asking (items) unpaid for to be read into the record?

Mr. STONEMAN.—Yes."

To which question defendant then and there objected on the ground that it was immaterial and that it was a matter to be determined by the Court itself. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify at length as to the result of his calculation.

THEREAFTER, on the 20th day of March, 1924, the said witness, William H. Popert was recalled for further redirect [119] examination and among other matters was asked the following question:

TESTIMONY OF WILLIAM H. POPERT, FOR PLAINTIFF (RECALLED—REDIRECT EXAMINATION).

"Mr. STONEMAN.—Have you made a computation for the purpose of showing the cost of the material used in the construction of the bridge under the requirements of Mr. Perkins? A. I have.

Q. Is it itemized as to the different character of material? A. It is.

Q. Will you please give me the results of your computation?"

(Testimony of William H. Popert.)

To which question counsel for defendant then and there objected on the ground that it was immaterial as the matter was already settled by the contract and because no demand was ever presented to the Board of Supervisors within six months from the furnishing of these items. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as to the items embraced in his computation, showing a total of $13,900.00.

THEREAFTER, and during the direct examination of said witness on behalf of plaintiff, the following proceedings were had:

"So that, until those supplemental plans and specifications had been approved by the Indian Department it was not possible was it, under the contract itself, to determine what either the extent of the changes, which in this case have been called extras, or the quantity or amount of the changes?

A. No, it was not possible to determine that.

Q. Now, did that consideration have anything to do with the wording of this clause of the contract as it was worded, that is, that all of the preliminary specifications stated in the contract were to be paid for as per *addenda* for extras upon the proposal accepted?

Mr. CLARK.—Now, we object to that, if your Honor please, as immaterial and calling for a conclusion, and for the further reason that that very phrase, the so-called *addenda* phrase, is in the bid

(Testimony of William H. Popert.)

and proposal of this plaintiff made long before this contract was ever made or any part of it.

The COURT.—No, the objection is overruled."

To which ruling the defendant then and there excepted. [120]

THEREAFTER the following question was asked of said witness by counsel for plaintiff:

"Mr. STONEMAN.—Now, did you prepare this November claim identified as Plaintiff's Exhibit No. 10?

A. I prepared it or assisted in its preparation. My name appears signed after Mesmer and Rice, using the words 'attorney in fact.'

Q. That November claim appears to be divided into two parts, one part according to the interpretation of the contract placed upon it by the Board and the other part according to the interpretation placed upon the contract by Mr. Mesmer. Is that true and was that intended by you to be shown'?

Mr. CLARK.—Are you speaking of the demand of November 5?

Mr. STONEMAN.—Yes, sir.

Mr. CLARK.—Well, we object. It is immaterial.

The COURT.—It speaks for itself?

Mr. CLARK.—The demand shows upon its face just what it is.

Mr. STONEMAN.—All right. That is satisfactory.

Mr. CLARK.—That is, in so far as it states anything.

(Testimony of William H. Popert.)

Mr. STONEMAN.—Now, I don't know just what counsel means.

Mr. CLARK.—Well, I mean exactly what I said.

Mr. STONEMAN.—All right, then. I repeat the question.

The COURT.—Where is that claim? This is the claim for $17,776.00? (Exhibit given to Court.) This answer is merely an explanation of those two items. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"That is a correct—If you mean that the second paragraph should be in with the first paragraph in the contractor's interpretation—the two should be added together."

THEREAFTER, and during the same examination, the following question was asked of said witness:

"Mr. STONEMAN.—Q. Either at the meeting held in November or at the meeting held in December was there any complaint expressed by any member of the Board of Supervisors that the demand of November 5 had not been properly itemized?"

To which question counsel for defendant objected as immaterial, which objection was by the Court overruled, to which [121] ruling the defendant then and there excepted. The witness in the meantime having answered, "No, sir."

THEREUPON, and during the same examination, the following question was asked of said witness:

(Testimony of William H. Popert.)

"Mr. STONEMAN.—Did you hear at that meeting on December 3 any member of the Board of Supervisors offer to pay any additional money to the Merritt extras and the sum of $6,204.00?"

To which question counsel for defendant objected on the ground that it was immaterial and upon the further ground that whoever made such statement offered it as a compromise that was unaccepted, proof of it would be inadmissible in any event.

WHEREUPON counsel for plaintiff stated as follows:

"Mr. STONEMAN.—It is not for that purpose. It is for the purpose of showing that it was the November demand which was in contemplation and being considered."

Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Your Honor, I can save time by saying, while I don't remember the exact name, I know that the Board felt as though they wanted to pay something —they wanted to do something to have the contractor satisfied and one of the members of the Board said that he would pay a thousand dollars extra and asked if that was satisfactory to Mr. Mesmer. Does that answer the question?

Mr. STONEMAN.—That is, for the purpose of closing the whole transaction? A. Yes.

The COURT.—Q. But you do not recall the name of the member of the Board who made that statement? A. No, I do not recall who it was."

(Testimony of William H. Popert.)

THEREAFTER, and during the cross-examination of said witness by counsel for defendant, the following question among others was asked:

"Mr. CLARK.—Did you have anything to do, Mr. Popert, with preparing or assisting in the preparation of the original bill in equity that was filed in this court by Mr. Mesmer? (No answer.)

Q. What is the answer: [122]

Mr. STONEMAN.—I object to the question because it is too general. If counsel has in his mind any particular thing which this witness—He don't pretend to be a lawyer—had to do with that, I ask that he direct his attention to it.

Mr. CLARK.—I will put it a little differently.

Q. Did you have anything to do with furnishing the information to Mr. Stoneman upon which that bill in equity was drawn? Did you consult with him as to any of the information used by him in making up that complaint at all?

Mr. STONEMAN.—I object.

The COURT.—What is the ground of your objection?

Mr. STONEMAN.—We object to it on the ground that it is irrelevant and immaterial as to any of the issues in this case, unless—

The COURT.—And not proper cross-examination?

Mr. STONEMAN.—And not proper cross-examination or unless it is an attempt to impeach the witness, in which event no proper foundation is laid, in that this witness—

The COURT.—The objection is sustained.

Mr. CLARK.—I will put it upon another ground. As to my intention to attempt to impeach the witness, your Honor—It is my intention to show that at the time this complaint was filed, it was the theory and, in fact, the position of the plaintiff that the extras mentioned here—

Mr. STONEMAN.—Please tell me where you are reading from.

Mr. CLARK.—Paragraph 4 of the bill of equity. That is the instrument that I have referred to. That the extras furnished were furnished in this way and now I will read from paragraph 4. 'Complainant avers that under the terms of such contract he entered upon the construction of such bridge but that thereafter from time to time during the performance of the labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to require of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras as set forth in said proposal, contract and specifications.' The point being that it was after the construction had commenced, as is stated here, that these changes were required.

Mr. STONEMAN.—Well, now, if that is the point, if your Honor please, I assert that the question is not justified by the reading of the allegations of paragraph 4 itself, that it refers to other changes.

The COURT.—From time to time.

Mr. STONEMAN.—That the changes were not contemplated except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule for extras—charged for extras.

Mr. CLARK.—According to the theory of plaintiff, your [123] Honor, all of them are to be paid for under that *addenda* and it is now claimed, not that these changes were required after construction had commenced, but that they were required largely before even the contract was signed and some of them after the contract was signed, but not a single one, as the record stands now, after construction had commenced. Not a single one. That is the status of the record here.

Mr. STONEMAN.—The further ground of objection, if your Honor please, that even if a statement of facts is in paragraph 4, which I do not admit, that neither the plaintiff nor this witness could be bound by it. It would be my mistake and not his.

Mr. CLARK.—Well, now, if the Court please, we do not say that they are bound by it positively. That is not our contention. We say that a pleading

(Testimony of R. C. Cresswell.)

filed by a party may be used as evidence only and I do not claim that it is absolutely binding but I think it is pretty strongly persuasive in all cases."

Which objection was by the Court sustained, to which ruling the defendant then and there excepted.

TESTIMONY OF R. C. CRESWELL, FOR DEFENDANT (CROSS-EXAMINATION).

THEREAFTER, Mr. R. C. CRESWELL, having been heretofore duly sworn, was called as a witness in behalf of the defendant, and upon his cross-examination the following proceedings were had:

"Mr. STONEMAN.—Q. Did you not know that when the bridge was finally constructed by Mr. Mesmer that it was not being constructed by Mr. Mesmer that it was not being constructed under the proposal and the plans and specifications originally submitted by him.

Mr. CLARK.—We object to that for the reason, as stated in our preceding objection, and further upon the further ground that the contract at that time controlled and that the contract speaks for itself as to those matters.

The COURT.—Objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"The COURT.—Did you not know at the time this bridge was being constructed that it was not

(Testimony of R. C. Creswell.)

being constructed under the plans and specifications as made in the proposal of Mr. Mesmer before the contract was accepted?

Mr. STONEMAN.—Before the award was made.

The COURT.—Before the award was made. Did you not know that the bridge was not being constructed in accordance with those plans?

A. Well, there was some little heavier parts but, as [124] I understood from the Engineer at that time, it did not amount to but very little.

Mr. STONEMAN.—Q. Didn't you know that the piling was being driven ten feet below the depth that it was intended to be driven under the original specifications? A. No, sir.

Q. Didn't you know that the piers were more than two feet greater in diameter than the piers were in the original specifications?

A. It was some larger but I don't remember how much.

Q. Didn't you know that there was additional thickness in steel in the pier cylinders?

A. Yes, sir.

Q. Didn't you know that a much greater yardage of cement would necessarily be used in the changes that would have been used by Mr. Mesmer under the original plans? You must necessarily have known that?

A. Well, of course, there would be some more but I did not know—I never did think there was a great deal."

(Testimony of R. C. Creswell.)

Omitting several questions said witness testified as follows:

"Q. Did you ever make any attempt to figure the weight of the excess material either in steel or cement?

(No answer.)

A. Did you? A. Sir?

Q. Did you ever make any attempt—Did it concern you at all as to the cost of the contract of all this extra material?

A. Why, yes, we got all of the information we could from our engineer.

Q. Did you read the letter that had been sent to you by Perry F. Borchers, Assistant Commissioner of Indian Affairs? A. I guess I did.

Q. With reference to that bridge?

Mr. CLARK.—If the Court please, I don't think the record will show that any letter was sent by Borchers to the Board of Supervisors.

Mr. STONEMAN.—No, I said sent to him. I did not say Board of Supervisors—sent to Mr. Creswell personally, my question is.

The COURT.—Yes, that is a fact.

Mr. STONEMAN.—You read that, did you?

A. Yes.

Q. Did you read in that letter that Mr. Borchers had said that the $23,800.00 appropriated by the County and $15,000.00 more—that with the $28,000.00 of the bond issue appropriated by the county for the building of the T–3 bridge over the Little

(Testimony of R. C. Creswell.)

[125] Colorado together with the $15,000.00 of the Government there would be $43,000.00 which he thought would be amply sufficient to pay for the increased cost? Did you read that in Borcher's letter or words to that effect?

A. Yes, I read that in the letter.

Q. Didn't that suggest to you, if nothing else, that the changes required by the Indian Department would necessitate a greater cost in material, labor and steel structure?

A. Well, that extra expense did not all go to Mesmer & Rice. We put on another steel span there by another company and built the bridges.

Q. That had nothing to do with it at that time, did it? A. No, sir.

Q. This $15,000.00 could only be used on the Little Colorado bridge, couldn't it?

A. It was used on the bridge.

Q. What are you talking about? You could not have used this $15,000.00 on another bridge if you had wanted to?

Mr. CLARK.—We think counsel is unfair with the witness. The witness says that $15,000.00 was used on the bridge, but it was used in building an extra span.

The COURT.—Yes, extra span on the same bridge.

Mr. CLARK.—Yes, and not in the contract with Mesmer & Rice at all.

Mr. STONEMAN.—Q. In other words, up to the

(Testimony of R. C. Creswell.)

time that you settled, as you claim, with Mesmer, then you still had that $15,000.00 in your pockets, didn't you?

A. No, we did not have it in our pockets.

Q. You had it in the County Treasurer's Office?

A. Yes.

Q. And had not spent a cent of it, had you?

Mr. CLARK.—If the Court please, that is wholly—

Mr. STONEMAN.—Q. Never used it for the payment of the construction of some work

The COURT.—It has been answered.

Mr. CLARK.—Well, we move to strike it then.

The COURT.—It may stand. The motion is denied.

Mr. STONEMAN.—Q. So that, as I understand you now, you got this $15,000.00 you got the bridge built for $23,800.00 and did not have to spend any of the $15,000.00, is that it? A. Oh, yes.

Q. On this bridge—on this particular bridge?

A. Yes, sir. [126]

Q. That is true, isn't it, according to your testimony?

A. We spent some $41,000.00 on this bridge.

Q. Afterwards. After the payment, as you claim was made to Mesmer on December 3, 1917? That was all after that, wasn't it? A. Yes, after that.

Q. All right, and then some floods came up and they washed away some of the approaches to this

(Testimony of R. C. Creswell.)

bridge built by Mesmer and you had $15,000.00 to put another span on it, didn't you? A. Oh, no.

Q. What did you use that for?

A. We had to build the approaches to get onto the bridge. When Mesmer & Rice quit the bridge, you could not get on there short of a twenty foot ladder.

Q. Didn't you accept the bridge on the 3d day of December?

A. Why, we accepted their work, as far as it went, yes, and paid them for it.

Q. And according to this contract?

A. Yes, sir.

Q. And according to Perkins' report?

A. As far as I know, yes, on Perkins' report.

Q. Then you spent $15,000.00 on top of it?

A. As I told you, we spent $41,000.00 on that bridge before it was completed.

Q. Before it was completed? A. Yes, sir.

Q. Why didn't you certify that it was completed and make a final payment on it on December 3?

A. Well, so we could use it, I mean—when I mean completed—

Q. Just what do you mean now?

A. Well, I mean completed so we could get over it with teams and automobiles.

Q. Just a minute.

The COURT.—Q. Didn't you accept that bridge as completed from Mesmer & Rice?

A. Under the contract, but I say we built another

(Testimony of R. C. Creswell.)
steel span on there of 120 feet and then the wooden approaches on that, which run the total of that bridge up to $41,000.00" [127]

THEREAFTER counsel for the plaintiff continued the cross-examination of said witness asking of him, among others, the following question:

"Mr. STONEMAN.—Didn't you know, Mr. Creswell, that Mr. Mesmer, in addition to the amount that he said that he would build this bridge for originally under his original proposal and specifications would have to pay out more money for material if he built it under the specifications as recommended by Jordan—by Perkins, your county engineer?"

To which question counsel for defendant objected on the ground that that was assumed by the contractor in his contract, that it was immaterial and is a matter that is determined by the contract which speaks for itself. That counsel was attempting to make this witness practically interpret the contract, something that the Court was to do. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to answer, saying "No." That it was his understanding that they were to build a bridge for the contract price of $23,800.00.

THEREAFTER, and during the same cross-examination, counsel for plaintiff asked the following question of said witness:

(Testimony of R. C. Creswell.)

"Mr. STONEMAN.—Now, when you submitted the Perkins' changes to the Indian Department, it was for suggestions as to whether or not any further changes might be required, wasn't it?"

To which question counsel for defendant objected on the ground that it was immaterial because the same thing had been shown time after time. That the time within which the defendant could present its case was going to be short if such cross-examination were pursued. Which objection was by the Court overruled to which ruling the defendant then and there excepted and the witness was permitted to answer, his answer being that he did not know.

THEREAFTER, the defendant closed its case. [128]

THEREAFTER, on the 21st day of May, 1924, the defendant filed and served upon counsel for plaintiff its motion for judgment as follows:

"Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:

1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435, Revised Statutes of Arizona.

2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called 'extras' which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6th. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement

with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge and which were set forth in the contract, were to be paid for as 'extras.'

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction. [129]

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a 'memorandum of points and authorities,' in support of this action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant."

Which motion was, by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plaintiff for the sum of Thirteen Thousand Eight Hundred and Seventy-two 65/100 Dollars ($13,872.65) denied, to which ruling, under and by virtue of this objection to said judgment, the defendant duly excepted.

After both sides in response to request heretofore made by the Court had announced that they had no further testimony to offer and the Court having thereafter for the benefit of respective counsel announced its views upon the weight of the evidence and the construction of the contract sued upon, and having requested counsel for both sides to submit briefs upon the law and upon the evidence and neither plaintiff nor defendant having requested special findings either of fact or of law, and having, on the 8th day of July, 1924, directed the Clerk to enter the judgment of the Court in favor of plaintiff for the sum of Thirteen Thousand Eight Hundred Seventy-two and 65/100 Dollars ($13,872.65) and judgment having been by the Clerk on said date so entered, defendant was by the Court permitted an exception to the entry of said judgment.

The attorneys for the plaintiff in error, the defendant below, having tendered this as the defendant's bill of exceptions to the rulings of the Court upon the trial of and to the motion for judgment and to the judgment rendered in this action, all within the period embraced in the extensions or allowances in addition to the time allowed by law from and after July 11, 1924, upon which date defendant was notified of said judgment, which extensions were granted by order of Fred C. Jacobs, judge of [130] said court, before the period previously allowed had elapsed, and have requested that the signature of said Judge and the seal of

the court should be annexed to the same pursuant to the statute in such cases made and provided, that said exceptions be settled and allowed, and certain amendments having been proposed to said bill of exceptions, No. one of which proposed amendments was denied, number two thereof was allowed, number three was withdrawn, numbers four, five, six, seven and eight were allowed, and in addition to the allowance of amendment number eight, as proposed by plaintiff, the defendant was permitted to add to said proposed amendment, the testimony of the matter contained in the last six lines at the foot of page 42 and all of page 42–B. And said Judge, pursuant to said request, has settled and allowed said exceptions and has placed his signature to this bill of exceptions, and caused the seal of said court to be affixed thereto, this 25th day of October, 1924, and ordered same to be filed.

F. C. JACOBS,
Judge. [131]

EXHIBIT No. 6.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs,
Washington.

Edu–Constr.
1000059–16.
99186–16.
A E M.

September 27, 1916.

Mr. R. C. Cresswell,
Chairman Board of Supervisors,
Holbrook, Arizona.

Sir:

Following Office telegram of the 25th, you are informed that examination of the specifications and drawings covering the construction of the proposed bridge across the Little Colorado River near Winslow, Arizona, shows that there are some structural defects which must be corrected and positive assurance given the Government that the location of the bridge and elevation of floor above the extreme high water line on record will not subject the bridge to danger from floating trees, logs and other debris.

Mr. Perry B. Borchers, Engineer representing the Office, visited the proposed site and submitted drawings showing that the bridge spans do not extend to the river bank at either end and to reach the spans timber trestles, protected by piling rifraf are to be erected. This construction will

constrict the width of the channel at this point to 500 feet which will in turn raise the high water mark, and as the drawing show that its elevation gives a clearance of but 10 inches from soffit of floor beams and about 2′ 0″ from that of the trusses, the danger from impact and accumulation of drift is manifest and should be avoided by raising the bridge 3′ 0″ and increasing the length of the tubes proportionately unless it is established beyond a doubt that the character of the drift is such that 10″ clearance is sufficient.

Structural defects shown by checking are as follows:

1. The metal in the tubular piers is too light for the diameter of the tube, it should be increased from ¼″ to ⅜″ down to the river bed and 7/16″ below the bed of the river. Abutment piers might be 1/16″ thinner throughout than indicated above. The angle bracing of the piers is also poor design as it is in danger from floating drift. Piers should be connected by a solid web. This might be either concrete as suggested in the specifications of Mesmer and Rice or a steel *diaphgram.* Either construction should be knee-braced to the pier.

2. The cover plate of the top chord and end posts is too thin for the distance between rivet lines, it should be increased from ¼″ to 5/16″.

(b) The two center panels of the lower chord have [132] insufficient cross section, they should be increased from 4 angles 4″x3″x⅜″ to 4 angles 5″x3″x⅜″.

(c) The lower lateral bracing has insufficient cross-section in the end panel and in the third panel, sizes should be increased from 1 angle 3″x3″x⅜″ to 1 angle 4″x4″x5/16″, and from 1 angle 3″x3″x¼″ to 1 angle 3″x3″x⅜″ respectively.

These, while essential to bringing the design up to the standard of the best practice in bridge designing and construction, will not add greatly to the cost of the structure, and in all probability the preferred bidders will incorporate the desired changes without extra charge in order that an award may be approved by the Secretary of the Interior and the work started at an early date.

You will please take this matter up with Messrs. Mesmer and Rice, the preferred bidders, and also with the Engineers for the County, State and Santa Fe Ry. Company, and advise this Office as to the result, for, before the matter is referred to the Secretary of the Interior for approval, the preferred bidders must agree to remedy the structural defects as herein set forth, and the assurance by the Engineers referred to must be given that the location of the bridge and elevation of its floor, will not subject it to flood damages.

There must also be incorporated in the contract a clause, providing for the approval of all shop drawings by the Commissioner of Indian Affairs, before any fabrication is started and the inspection of all material and construction by a Government representative at any and all times.

Respectfully,

(Signed) E. B. MERITT,

Assistant Commissioner. [133]

EXHIBIT No. 9.

Referred to Co-Engr. for report.
(Rejected.)
11/5

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Arizona, Oct. 1, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of ——— Dollars For as listed below—Winslow bridge, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND.

As per original contract & original PLANS Structural steel-deld. 147 ton @ $120.00	17,640.
Lumber and Piling	600
Concrete in Piers	1,100
Cylinder Steel—part in place	1,400
Piling in place (not including material)	600
Value of Material	21,340
Less 20%	4,270
	17,070
For extra mat'l. and labor (part in place) deductions made	10,600
Amount paid on account	27,670
	12,624
Balance Due	15,040

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

MESMER & RICE,
By WILLIAM H. POPART,
Attorney-in-fact.

Sworn to and subscribed before me the 1st day of October, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors,
Notary Public.

My commission expires:
Filed 10/1/17. R. S. Teeple, Clerk. [134]

EXHIBIT No. 10.

Rejected.
11/5/17.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz., 11/5/17.

MESMER & RICE Presents this demand on the County of Navajo for the sum of $17,776.00 ———

Dollars for Winslow Bridge—as given below, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND.

	Dollars
Material and labor, as per original PLANS and original contract, but not including work not yet completed	22,000.00
Less 20%	4,400.
	17,600.00
For extra materials and labor, including work ordered by County's inspector and including assistance on surveys for which deductions have been made for part not complete, and on which 20% retained, net	12,800.00
Total	30,400.00
Amount paid on account ...	12,624.00
Balance due	17,776.00

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that

the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

MESMER & RICE,
By WILLIAM H. POPERT,
Attorney-in-fact.

Subscribed and sworn to before me the 5th day of November, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors, Notary Public.

My commission expires:

For value received I hereby assign this demand to ———.

———————————.

Filed 11/5/17. R. S. Teeple, Clerk, Board of Supervisors, Notary Public.

Approved and ordered paid for $4976.00.

Rejected 11/5/17. [135]

EXHIBIT No. 11.
DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Arizona, Dec. 3d, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of Sixty-two hundred and Four and 62/100 Dollars balance due to complete the amount of $23,800.00 on contract, for Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND.

Contract price	$23,800.00	
Labor drilling holes	27.14	
1958. 4# reinforcing steel	137.08	
Labor furnished engineer	31.40	
		23,995.62
LESS		
Previous payments .	17,600.00	
Rent of cement mixer	176.00	
Repairs of cement mixer	15.00	
		6,204.62

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) LOUIS F. MESMER.

Sworn to and subscribed before me December 3, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors, Notary Public.

My commission expires:

For value received I hereby assign this demand to:

Demand No. 1.

Warrant No. 426.

Filed Dec. 3d, 1917. R. S. Teeple, Clerk Board of Supervisors.

Approved and ordered paid by WI-COLO BRIDGE FUND.

$6204.62.

R. W. CRESWELL,
Chairman. [136]

EXHIBIT No. 13.

Holbrook, Arizona, Aug. 9, 1916.

To the Honorable Board of Supervisors,
Navajo County.

Gentlemen:

At your request we have considered the proposals for the construction of seven bridges presented to your Honorable body by various contractors under date of July 1st, 1916.

We have found among these a great mass of valuable suggestions. We consider that the majority of these propositions are worthy of serious consideration.

We wish to express our appreciation of the assistance and co-operation of Mr. Chas. E. Perkins,

County Engineer. His detailed examination of the plans submitted shows careful consideration of important details, and we are in substantial agreement in regard to his recommendations.

We wish to emphasize the importance of his recommendation in regard to the foundations of these various bridges on consideration. In this connection we would respectfully recommend that cylinder piers should be at least sixteen feet deep below the river bottom and should have a minimum diameter of 72 inches. In cases where hard foundations can be found at shallower depth than above, we would recommend mass concrete piers in place of cylinders. Wherever the material is found to be unstable or quick sand at the extreme depth mentioned above we would respectfully recommend that piles be driven within such steel cylinders entirely through such unstable material or quick sand to a firm bearing. In case no such firm material is found we would recommend that *forth* foot piles be driven for their full penetration below the bottom of the cylinder.

In connection with the selection of the proposal to which the contract should be awarded for the construction of the seven bridges concerned, we wish to commend the methods followed and the conclusion reached by your County Engineer. The amount of money at the disposal of the Board would seem to make the recommendation of your County Engineer entirely satisfactory and reasonable. Our own preference however would be for a heavier and more expensive type of bridge.

With certain modifications we should recommend to your Honorable body the construction of the bridge over the Little Colorado River near Winslow, Contract No. 1, according to the plans and specifications submitted by Mesmer and Rice, Engineers and Contractors, Marsh Strong Bldg., Los Angeles. With proper concessions in the matter of price, we should recommend the steel structure designed for carrying concrete floor but for the immediate present the use of a wood floor thereon. We should recommend the three span structure having 14-foot road way. All piers and abutments should be built of mass concrete extending 16 feet below river bottom and should rest on piles having about 30 feet additional penetration. In this connection we believe that the prices given for extras by this firm are excessive and should be modified if contract is awarded to them.

We would recommend the selection of a similar design by [137] the same firm for Contract No. 3, except that at that point, we would select design mentioned in their proposal as "c" with wood floor and wood joints.

On all other contracts we would recommend the designs of the same firm having 14-foot roadway, steel joists and wood floor but with this modification: We would prefer that the top chord should be fabricated from channel irons and plates rather than from angle irons and plates.

While we are fully aware of the importance of the monetary considerations involved we wish to urge as strongly as possible a selection of relatively

heavy type of bridge. We are fully convinced that no one can estimate fairly the importance of and extent of the traffic that will pass over these bridges during the next few years. We are firmly convinced that the development of this traffic will far exceed the expectations of the most optimistic. We would respectfully urge upon your Honorable body that provision should be made for the development of a traffic of from four to five hundred motor vehicles a day.

For your further guidance we append below a statement showing the modifications we would recommend in the other designs submitted, provided you should select otherwise than as recommended above.

BIDDER No. 1. Details of plans insufficient.

2. Weight of metal should be increased.

3. Steel should be made heavier, angle irons in top chords should be replaced by channel irons. 1 beams joists should be given greater depth.

4. Prefer structures riveted throughout, do not consider pin connected bridges desirable.

5. Short span designs very satisfactory. Weight of six inch channels, upper chord, eighty foot spans not shown. Lower

chord about 16 per cent lighter than Mesmer and Rice design. Floor joists six inches instead of eight inches.

7. In the eighty foot spans, weight of channel used not shown. Bottom chords 16 per cent lighter than Mesmer and Rice design. Floor joists seven inches deep on 20-foot span as compared with eight inches deep on sixteen-foot span Mesmer and Rice design. They fail to show additional joists for 14 foot roadway. Should show at least three lines of 1's instead of two as shown on plans. Prefer heavier structure throughout.
8. Suspension bridge plan not considered. Other designs, weight of metal should be increased.
9. Details of plans insufficient.

Any bid accepted should be with the understanding that detailed plans showing all details should be submitted for the approval of the County Engineer prior to the mill work and fabrication. [138]

In conclusion we wish to suggest that if necessary in order to bring the total expenditures within

the amount available, it might be advisable to use 12 feet width on the shorter bridges. We suggest further that the amount of funds available should not be the determining factor if it is possible to secure any additional requirements. We would urge your consideration of means to secure the additional amount required and to proceed according to our recommendations herein contained.

Very respectfully submitted,

THOMAS F. NICHOLS,

For State Engineer. [139]

EXHIBIT No. 17.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Los Angeles, California, May 21, 1918.

MESMER & RICE Presents this demand on the County of Navajo for the sum of Seventeen Thousand One Hundred Eighty-nine and 65/100 Dollars, For Balance due to complete contract for Bridge T–3 over Little Colorado near Winslow, the items of which are herein listed:

ITEMS OF THE FOREGOING DEMAND.

Original contract Proposal, 23,800.00	23,800.00
Extras required by Mr. Perkins:	
Cylinder steel, 63,278, @ 7½¢ ..	4,745.00
Superstructure steel, 7, 740 @ 7½¢	580.00
Reinforcing-Bonding upper and lower cylinders 1960#, @ 7¢	137.20

Extra Concrete in cylinders, 236 yds. @ $20.00	4,720.00
Reinforcing in web walls, 1235# @ 7¢	86.45
Extra Concrete in web walls, 29 @ $25	725.00
Extra Piling, 44 Piles @ $15	660.00
Extra Excavation, 136 yds. @ $5.00	680.00
Extra work and material required by inspector:	
Dulling Habs.	27.14
Reinforcing 1958.4	137.08
Labor furnished Engineer	31.40
Additional length of Piling required by Board—original estimate based on Piling 16′ long, 1640	1,640.00
Flood losses as result of delay in approving drawings	3,216.00
Less previoups payments	41,185.27
	23,995.62
Balance due	17,189.65

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct in every particular and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

LOUIS F. MESMER.

Subscribed and sworn to before me this 21st day of May, 1918.

D. O. MEDDLETON,
Notary Public in and for the County of Los Angeles, State of Cal. [140]

EXHIBIT No. 4.

REPORT OF THE COUNTY ENGINEER UPON PROPOSALS FOR CONSTRUCTION OF BRIDGES.

To the Honorable Board of Supervisors,
Navajo County, Arizona.

Gentlemen:

Responsive to your invitation for bids for the construction of bridges under the proceeds of the recent bond issue for that purpose, there were received at your office on July 3rd, and referred to the Engineer's office for report on this date, proposals from nine separate companies or individuals ag-

gregating in the different combinations of super and substructures, fifteen hundred and forty-three distinct propositions.

This office has diligently worked and reviewed each and every one and on account of structural defects and local requirements 1260 of these proposals have been eliminated. Accompanying this report is a tabulated sheet of the remaining 283 proposals, which graphically presents and compares to you a summary which can be easily and quickly deduced. This office has likewise carefully weighed the advantages and disadvantages of the plans and these costs tabulated.

> "Consultation has been made with the Engineers of the State and those of the A. T. and S. F. R. R. Company."

For the construction of the bridge near Winslow there is an appropriation of $15,000.00 conditioned upon a like amount being appropriated and used by Navajo County for this purpose, making a total of $30,000.00 for the bridge named which is amply sufficient to cover the cost of the super and substructures and the necessary approaches.

This office has certified to the Indian Department that the County of Navajo has appropriated and set apart the sum of $15,000.00 or more, which was and is available to be used for the construction of a bridge east of Winslow, and has had conversation by phone with the agent at Leupp relative to this. Mr. Janus, the agent, gives assurance that the $15,000.00 appropriation by Congress is available, and requested that a copy of the accepted

plans, specifications and construction be forwarded to him.

At this time I suggest and recommend that an invitation be extended to the Indian Department through Mr. Janus, to co-operat*ive* in the construction of the Winslow bridge by detailing an inspection engineer to act jointly with the County Engineer upon that bridge. I think this invitation essential and desirable.

Of the plans presented there are those of a six span bridge, a five span bridge, a three span bridge, a two span bridge and a one span suspension bridge. Although except*ly* desirable at this point, the single suspension span must be eliminated from contemplation for the reasons of difficulties of constructing abutments of [141] sufficient bearing resistance to sustain the weight imposed, and that of one guy terminal falling in the center of stream bed of Cottonwood Creek.

The short spans at this point will entail excessive pier cost in preparing assured foundations which are absolutely necessary.

For the foregoing reasons this office has selected and recommends that a bridge of two spans of 200 and 48 feet, 6 inches each, as submitted and proposed by bidder No. 7 be adopted. The price stipulated is $121,115.00, with the addition of extra cost, for addition length of piling and yardage of concrete and all other items enumerated within the proposal, which with the cost of approaches will consume the total adopted $30,000.00 and more.

In comparing the relative cost of the remaining bridges advertised between the various bidders, it is found that those under No. 7 compare favorably and are the best. In fact, the total cost of the most desirable plans as made by this bidder, assuming $15,000.00 is the sum of the County money to be set apart for the Winslow bridge, is $51,863.00. The only other summary of tabulated bids which less than this stipulates a five span bridge at Winslow and the next highest which also contemplates a five span is $52,110.00; in fact, bidder No. 7 has presented the only proposal for a two span bridge.

In addition to the reasons given in a former paragraph, the expenditure for pier cost can with advantage be concentrated upon one pier at the center of the stream, where the brunt of the current, scour and force of drift are maximum.

The bridges selected and hereby recommended by this office are such as are most suitable to the respective localities, most serviceable, economical, stable and fully meet the conditions contemplated and desired. They are as follows:

(See Tabulation Sheet No. 7.) Bridge No. 1, (T–3) over Little Colorado east of Winslow. 2 spans of 248′ 6″ each.

Piers to be three in number of 2 steel tubes, the center pier tubing of 72″ diameter those at each end of 48″ diameter; 12 to 16 feet below stream level with piling driven within to a refusal sufficient to sustain a load of not less than fifteen tons to each piling; tubes to be filled with a rich concrete mixture; superimposed upon these concrete-filled tubes,

a reinforced concrete pier to be raised to a height of two feet above the level of the bottom chord of the adjacent A. T. & S. F. R. R. bridge. Superstructure to be two pin bow steel spans, 248′ 6″ each resting on the piers specified, 14′ roadway, steel joists, wood 3″ floor, and lattice hand rail.

The foregoing provisions are included in the proposal made.

Bridge No. 2 (T–2) over Cottonwood east of Winslow:

1 Span of 129′ resting on piers of the construction identical with the preceding, excepting that the tubing to be three in number for each pier and 36″ in diameter, piling driven 16′. The superstructure to be 1 Span 129′ in length of the pin bow style, roadway 14, steel joists, 3″ wood floor lattice railing.

Cost—$3,720.00 [142]

Bridge No. 3 (V–1) over Little Colorada near St. Joseph.

6 Spans of 84′ 4″ each resting upon piers consisting of 2 steel tubes, 48″ in diameter with piles driven within in sufficient number and to the required depth to sustain the load to be imposed, tubes to be filled with a rich concrete mixture; superimposed upon these tubes to be reinforced concrete pier to the specified height. The superstructure to a pin connected steel pong trusses as designed in the proposal, 14′ roadway, steel joists, 3″ wood floor, lattice railing,

Cost—$14,775.00.

Bridge No. 4 (T–1) over La Roux Fork west of Holbrook.

2–80′ spans resting upon piers identical with those designated for Bridge V–1. The superstructure to be of the pin connected type as designated in the proposal, 14′ roadway steel joists, 3″ wood floor, lattice railing,

Cost—$3,619.00.

Bridge No. 5 (&–2) over La Roux Fork north of Holbrook. The design of this bridge and piers to be identical with that designated for Bridge No. 4, (T–1).

Cost—$3,919.00.

Bridge No. 6 (&–3) Cottonwood on Keam's Canon Road.

1 Span of 80′ resting on piers of solid concrete superimposed upon piling. The superstructure to be a pin connected truss, 14′ roadway, steel joists, 3″ wood floor, lattice railing,

Cost—$2,600.00.

Bridge No. 7 (A–2) Cottonwood near Snowflake.

2 Spans of 130′ each resting on piers consisting of H steel piling driven to an extreme depth and extending to the height of the shoe of the superstructure. The supersurface portion to be inclosed within a block of reinforced concrete carried down below the scour of the stream. On account of different subsurface conditions at this point a radically different style of substructure has been adopted. The water-way of 160′ at this bridge is 100′ wider

than that of the original estimate made by this office in 1915.

The superstructure to be two pin connected steel trusses, 14′ roadway, steel joists, 3″ wood floor, lattice railing,

Cost—$8,230.00.

Bridge No. 8 (N. I.) over Silver Creek near Snowflake.

It was intended and agreed that this bridge should be reconstructed out of material now on hand, but owing to changed conditions it is deemed advisable to award the work of erecting this bridge in addition to the other contracts, using 2 steel spans, 1 of 77′ and one of 52′ now on hand consisting of [143] new and intact member, resting upon piers to be constructed in the style and manner as those designated for the preceding bridge—No 7.

Cost—$———Minimum.

Bridge No. 9 (C–2) over Colorado south of Woodruff.

This is a short span and little work is involved, as the material is on hand and agreement has been made to erect this bridge by local labor.

Cost—″———Minimum.

The original estimate of this office for the construction of these 9 bridges was $63,000.00. Considering the unprecedented advance in the prices of structural steel since that estimate was made, it is gratifying to find that the sum is still adequate. Furthermore, an investigation has been made by this office relative to the supply of steel available in different localities of the United States, and

the consequent ability of bridge contractors to furnish, erect and complete within a reasonable time the work under contemplation. With no intention of desporagement of other bidders, it is found that bidder No. 7 stands well toward the head of the list in this particular; it not only being a reliable contractor but a constructor of bridges within its own shops. It is, as well, fully able to guarantee its design to meet the standard requirements usual for this kind of work, and this guarantee should be incorporated in all contracts. Copper's General Specifications for Highway Bridges have been adopted as this standard and should be named as a guide for construction. In the course of investigation the fact developed that the bidder named was equipped and capable to prosecute and complete all of the work within a minimum time limit.

The items of major importance in all bridges are foundations and these must be such as will be stable and safe under all conditions which may arise.

In the general preliminary specifications which issued from this office, an advisory plan for piers was given, and although this plan has since then received the commendation of several reputable engineers, it is recommended that it be left optional with the County Engineer to substitute by agreement where desirable concrete filled large steel tubes for the subsurface portion of these piers in place of the solid block of concrete specified. This in no way will change the original plan for the subsurface portion nor be detrimental. Tubes in all cases

will be of sufficient area to receive piling adequate to sustain the load to be imposed, viz.: not more than 15 tons upon each pile.

In the final summary it will be seen that with reasonable care, excellent bridges, as adopted, can be constructed, inclusive of the approaches in all the 9 locations stipulated for or within the amount of the original estimate—$63,000.00.

As this office has used all diligence, care and has had consultation in ascertaining and weighing the facts and figures presented, it is presumed that the Honorable Board will not desire an exhaustive explanation of these, as they are such that can be and are set forth in a graphic form on the accompanying tabulation sheet.

Owing to the fact that the utmost deliberation has been [144] taken since the inception, adoption and receipt of the bridge bond funds, and that the season has advanced to the most desirable time to commence construction work, it seems imperative that these contracts should be awarded and the work be put under way immediately. The pressure of public opinion seems to be in favor of this.

Respectfully submitted,
CHARLES E. PERKINS,
County Engineer.

[Endorsed]: Bill of Exceptions. Filed Sept. 30, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [145]

In the District Court of the United States, District of Arizona.

No. L–56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

PROPOSED AMENDMENTS TO BILL OF EXCEPTIONS.

Comes now Louis F. Mesmer, doing business under the name and style of Mesmer & Rice, by his attorney, George J. Stoneman, and to the bill of exceptions heretofore on the 29th day of September, 1924, presented for approval, a copy of said bill of exceptions having been served upon the attorney for plaintiff on October 2, 1924, makes and files this his proposed amendments to the said bill of exceptions as follows, to wit:

PROPOSED AMENDMENT No. 1.

On page 45 of said bill of exceptions that the following statement be eliminated:

> "Which motion was, by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plaintiff for the sum of Thirteen Thousand Eight Hundred and Seventy-

two 65/100 Dollars ($13,872.65) denied, to which ruling, under and by virtue of this objection to said judgment the defendant duly excepted."

for the reason that it appears that the motion referred to was not made during the progress of the trial of said case or at the close of the taking of testimony and for the further reason that it does not appear that any ruling made by the Court upon the said motion was excepted to or that an exception thereto has been allowed. [146]

PROPOSED AMENDMENT No. 2.

That in lieu of said language as above set forth, or in the event your Honor shall not strike said portion of said proposed bill of exceptions, there be inserted immediately following said language on page 45 of the bill of exceptions the following statement:

"After both sides in response to request heretofore made by the Court had announced that they had no further testimony to offer and the Court having thereafter for the benefit of respective counsel announced its views upon the weight of the evidence and the construction of the contract sued upon, and having requested counsel for both sides to submit briefs both upon the law and upon the evidence and neither plaintiff nor defendant having requested special findings either of fact or of law, and having on the 8th day of July, 1924, directed the Clerk to enter the judgment of the Court in favor of plaintiff for the sum of Thirteen Thousand Eight Hundred Seventy-two and 65/100 Dollars

Dollars ($13,872.65) and judgment having been by the Clerk on said date so entered, defendant was by the Court permitted an exception to the entry of said judgment."

PROPOSED AMENDMENT No. 3.

On page 45 of said bill of exceptions in lieu of the words:

"the extension or allowance of seven to five days."

the following words shall be used:

"the extension or allowance of seventy-five days."

PROPOSED AMENDMENT No. 4.

On page 8 of the said bill of exceptions after the words

"and asked to be read and considered as a part hereof."

that the following excerpt from the transcript of evidence as shown upon page 80 thereof be inserted:

"Mr. STONEMAN.—Your Honor has read the letter?

The COURT.—Yes, sir. Was that marked for identification?

The CLERK.—Yes, No. 6.

The COURT.—It is now 6 in evidence." [147]

PROPOSED AMENDMENT No. 5.

On page 19 of the said bill of exceptions after the words:

"That it was incompetent for the purpose offered or for any purpose."

insert the following: excerpt from the transcript of evidence as shown upon pages 204 and 205 thereof:

"The COURT.—No, but it may be leading up to a question that is.

Mr. CLARK.—Nevertheless, your Honor, we do not think it ought to go in, for the reason stated. It is incompetent for the purpose offered or any purpose.

The COURT.—Q. This was the engineer in charge of the work for the company, you say?

A. This was an engineer—He was county engineer and the county board referred these plans and specifications to him.

The COURT.—The objection is overruled.

Mr. CLARK.—We will note an exception.

Mr. STONEMAN.—Q. Now, then, was there any discussion as to the reasons why the changes contemplated should not be paid for and included in the lump sum of $23,800.00 that you said you would construct the bridge for under the original plans and specifications?

Mr. CLARK.—We make the same objection, your Honor. That is an executive matter that could only be settled by the Board.

The COURT.—Yes, but it is merely a discussion. The objection is overruled. You may have an exception.

Mr. CLARK.—Yes, we will take an exception.

A. The original plans provided, for instance, that the end cylinders would be thirty-three

inches in diameter and have two piles in each cylinder and filled with concrete twenty-one feet long. The alteration, for instance, in the end cylinders substituted for a thirty-three inch cylinder a seventy-two inch cylinder, one that was thirty feet long instead of twenty-one feet long, one filled with seven piles driven to a fifteen ton refusal and piling requiring thirty foot of length as against the original one which only required two piles. Understand, in the original plan, two piles and they were increased to seven. Originally, the cylinder was twenty-one feet long and the new cylinder was thirty feet long. The diameter of the original cylinder was two foot nine inches and the diameter of the final cylinder was seventy-two inches, a very material difference."

PROPOSED AMENDMENT No. 6.

On page 26 of the said bill of exceptions after the words:

"what happened before the Board of Supervisors on December 3, 1917."

insert the following excerpt from the transcript of evidence as [148] shown upon pages 250, 251, 252 and 253 thereof:

"Mr. STONEMAN.—Q. What did you argue about? Can you say all that happened all day long in two sentences? Start in at the beginning and tell what happened and what was done and what the subject of it was and, as near as you can, what was said between you and the Supervisors?

A. Well, we argued over the question of the extras involved by reason of the changes covered by Perkins, by Mr. Merritt's request and by the Engineer's request—the representative of the county on the job. The county absolutely refused to consent in any way to making us an allowance by reason of any of the changes made in the plans at the request of Mr. Perkins embodying Mr. Nichols' recommendations. They agreed to pay for the extras involved on the job by reason of the inspector, this $195.00 item; they agreed to pay for the changes involved in the plans by reason of the incorporation of Merritt's request—

Mr. CLARK.—I would like to have the conversation stated as nearly as we can.

The COURT.—Yes, if you can remember the conversation.

A. Your Honor, there were three supervisors present and we had a kind of a round robbin there. We talked all day over this thing and I am just trying to sum up into a kind of a conclusion as to what was said after the whole day's argument.

Mr. STONEMAN.—Q. Now, what was the subject of the argument? A. Extras.

Q. The demand that you had previously put in in November? A. Yes, it was the extras that were involved—I had extra in our November demand and this—November 5—I will repeat it again. This November demand, they finally said, 'We will allow this—we will allow

the expense incurred by reason of the changes made at the request of our inspector, first. Second, we will allow the changes in the plan as made at the request of Merritt. Third, we will not allow anything on the changes made in the plan as embodying Perkins' recommendations and Nichols' report as carried out.' Well, we quit at 5:00 o'clock and I went over from there to Perkins' house.

Q. And, in the meantime, you had not received any money out of the November demand? A. No, sir, they would not give me any money and, in order not to disturb my equities, I refused to go on that basis. I then went over to Perkins' house with Mr. Popert and I saw there some of the original calculations involving the extras involved by reason of these changes carried out by the unit prices as per *addenda;* I saw Merritt's letter covering these —requesting these changes and I saw the rough parts of the paragraph covering the substructure and I then went over to Mr. Larson's house and we had—with Mr. Popert and talked with him a little bit and I asked him if there was not some kind of a way of getting out of this thing—I was in desperate straits—and he thought probably there was and, at his suggestion, we came back—we decided to go back and have another round robbin in the evening after the Board convened and we talked again. I told the Board that I would not accept any demand on [149] Merritt's alterations but I

would accept the pay for the balance due to make—to complete the original plans and I would accept the additions involved by reason of the inspector on the job. The Board drew up a warrant which was finally on that basis and I left in a huff and went to the station and said, 'I am through. I can't do business—'

Q. You say it was final?

A. I will give you the—

Q. Give you 11 and 12?

A. 11 or 12, one of those.

Q. I hand the witness Plaintiff's Exhibits 11 and 12.

A. The county drew up the Exhibit 12 and I refused to sign this, because it was—stated for full payment of contract of Winslow Colorado Bridge and I left in a huff and went to the station. When I was there, Mr. Popert says, 'Here, I represent the American Bridge Co. We have got to have some money. I am going back there as a representative of the American Bridge Co. and see if we can't reach some compromise with the Supervisors,' so he went back and had a talk and about on hour or half an hour afterwards, he came back and he says, 'Now, be reasonable, Mesmer. Come on over there and we will talk this thing again,' so I went back again and, after considerable argument, in which Mr. Freeman said he was perfectly willing to give me a thousand dollars for my extra foundation but that is about as

far as he would go and which I said I could not accept, we finally drafted this No. 11—Exhibit 11, wherein it specifically stated just what the $6,204.62 covered. It specifically left out Merritt's alterations.

Mr. CLARK.—Isn't that matter appearing on the face of the demand and it doesn't need any elaboration by the witness? It speaks for itself.

The COURT.—It probably does but he has already testified to it.

A. The reason that I insisted on leaving out Merritt's alterations, over which there was no controversy and never was any controversy, because that I did not want to embarrass myself by putting the claim with the county—which the county contended was not relevant, in with the claim that they had admitted to be correct. They signed the draft as drawn up and the warrant was drawn for the amount. Before, however, the warrant was drawn, Mr. Larson, District Attorney, drew up a formal release, in which I agreed to save the county harmless for all liens of labor or any kind of bills that might be incurred and he turned around to Mr. Popert and asked him if he was satisfied he could get his money out of me; that he owed me the money; and when he told him he thought he would take a chance, they drew a warrant and signed it and I left."

PROPOSED AMENDMENT No. 7.

On page 28 of the said bill of exceptions after the words "Yes, sir," insert the following excerpt from the transcript of [150] evidence as shown upon pages 258 and 259 thereof:

"Q. What did you say and who did you say it to?

A. Told the whole Board that I reserved the right to sue for the extras involved by reason of the changes in the plans covered by Merritt's extras or the Indian Department extras and the changes in the plans by reason of the incorporation of Perkins' requests.

Q. Do you know whether at that time there was any reference to the extras as being included in the November 5 claim?

A. State that question again.

(Question read.)

Q. Those extras that you reserved the right to sue for.

A. They were all included in the November 5 claim.

Q. Did the Board understand—Did you say anything to the Board identifying the extras that you claimed the right to sue for as being the extras included in the November 5 demand?

A. That was what we were talking about all of the time, the extras involved in the November 5 claim, yes, sir. The extras of the No-

vember 5 claim was the only subject of dispute or ever was in dispute.

The COURT.—Q. That is all that you are suing for? A. Yes, sir."

PROPOSED AMENDMENT No. 8.

On page 42 of the said bill of exceptions after the words:

"OMITTING several questions said witness testified as follows."

the following excerpt from the transcript of evidence as shown upon pages 507, 508 and 509 thereof:

"Q. Did you ever make any attempt to figure the weight of the excess material either in steel or cement?

(No answer.)

Q. Did you? A. Sir?

Q. Did you ever make any attempt—Did it concern you at all as to the cost of the contract of all this extra material?

A. Why, yes, we got all of the information we could from our engineer.

Q. Did you read the letter that had been sent to you by Perry F. Borchers, Assistant Commissioner of Indian Affairs?

A. I guess I did.

Q. With reference to that bridge?

Mr. CLARK.—If the Court please, I don't think the record will show that any letter was sent by Borchers to the Board of Supervisors.

Mr. STONEMAN.—No, I said sent to him.

I did not say Board of Supervisors—sent to Mr. Creswell personally, my question is.

The COURT.—Yes, that is a fact.

Mr. STONEMAN.—Q. You read that, did you? A. Yes.

Q. Did you read in that letter that Mr. Borchers had said that the $23,800.00 appropriated by the county and $15,000.00 more—that with the $28,600.00 of the bond issue appropriated by the county for the building of [151] the T–3 bridge over the Little Colorado, together with the $15,000.00 of the Government there would be $43,000.00 which he thought would be amply sufficient to pay for the increased cost? Did you read that in Borcher's letter or words to that effect?

A. Yes, I read that in the letter.

Q. Didn't that suggest to you, if nothing else, that the changes required by the Indian Department would necessitate a greater cost in material, labor and steel structure?

A. Well, that extra expense did not all go to Mesmer & Rice. We put on another steel span there by another company and built the bridges.

Q. That had nothing to do with it at that time, did it? A. No, sir.

Q. This $15,000.00 could only be used on the Little Colorado bridge, couldn't it?

A. It was used on the bridge.

Q. What are you talking about? You could

not have used this $15,000.00 on another bridge if you had wanted to?

Mr. CLARK.—We think counsel is unfair with the witness. The witness says that $15,-000.00 was used on the bridge but it was used in building an extra span.

The COURT.—Yes, extra span on the same bridge.

Mr. CLARK.—Yes, and not in the contract with Mesmer & Rice at all.

Mr. STONEMAN.—Q. In other words, up to the time that you settled, as you claim, with Mesmer, then you still had that $15,000.00 in your pockets, didn't you?

A. No, we did not have it in our pockets.

Q. You had it in the County Treasurer's Office? A. Yes.

Q. And had not spent a cent of it, had you?

Mr. CLARK.—If the Court please, that is wholly—

Mr. STONEMAN.—Q. Never used it for the payment of the construction of some work?

The COURT.—It has been answered.

Mr. CLARK.—Well, we move to strike it then.

The COURT.—It may stand. The motion is denied."

Dated: This 11th day of October, 1924.

Respectfully submitted,

GEORGE J. STONEMAN,

Attorney for Complainant.

[Endorsed]: Proposed Amendments to Bill of Exceptions. Filed Oct. 13, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [152]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, October 16, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 16, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 25, 1924, TO SETTLE BILL OF EXCEPTIONS.

It is ordered by the Court that time within which to settle defendant's bill of exceptions herein is hereby extended to and including Saturday, October 25th, 1924, owing to stress of court business, the Court having been unable to settle said bill of exceptions within the time heretofore allowed. [153]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, October 17th, 1924.)

No. L-56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 17, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 27, 1924, TO SETTLE BILL OF EXCEPTIONS.

It is ordered by the Court that time to settle bill of exceptions herein is further extended to and including the 27th day of October, 1924, owing to stress of court business, the Court being unable to settle the bill of exceptions within the time heretofore allowed. [154]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, October 17th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 17, 1924—ORDER RE PROPOSED AMENDMENTS TO BILL OF EXCEPTIONS.

The defendant having filed proposed amendments to its bill of exceptions herein,—

IT IS ORDERED as follows:

First proposed amendment is disallowed.

Second proposed amendment is allowed.

Third proposed amendment is withdrawn.

Fourth, fifth, sixth, seventh and eighth proposed amendments are allowed.

IT IS FURTHER ORDERED that there be added to the eighth proposed amendment that portion of the Reporter's transcript beginning with line 6 of page 510 to and including line 18. [155]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, October 25th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 25, 1924—ORDER PERMITTING TEMPORARY WITHDRAWAL OF BILL OF EXCEPTIONS FROM FILES.

It is ordered by the Court that the defendant be allowed to withdraw temporarily from the files of the Clerk the proposed bill of exceptions for the purpose of incorporating amendments therein, as heretofore allowed. [156]

In the District Court of the United States, District of Arizona.

No. 56 PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

PETITION FOR WRIT OF ERROR.

Comes now the above-named defendant, Navajo County, by its attorneys, and respectfully represents that this action is brought by the plaintiff to recover of the defendant a balance alleged to be due of Thirteen Thousand Eight Hundred and Seventy-two Dollars and Sixty-five cents ($13,872.65), for extras in the construction of a certain bridge across the Little Colorado River near Winslow, Arizona.

That on the 17th day of March, 1924, said cause came on for trial before the above-entitled court, sitting without a jury, and thereafter on the 8th day of July, 1924, said Court rendered judgment in favor of said plaintiff and against your petitioner, the said defendant, for the sum of Thirteen Thousand Eight Hundred and Seventy-two Dollars and Sixty-five cents, ($13,872.65), and for costs of suit

taxed at the sum of One Hundred and Fifty-two Dollars and Ten cents ($152.10).

And your petitioner feeling it is aggrieved by said judgment therein entered, as aforesaid, respectfully [157] petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the 9th Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue herein to the United States Circuit Court of Appeals aforesaid, sitting at the City of San Francisco, in the State of California, in said Circuit, for the correction of errors complained of and herewith assigned, and that an order be made fixing the amount of security to be given by this defendant as plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the said Circuit Court of Appeals, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

THORWALD LARSON,
Co. Atty.
E. S. CLARK,
NEIL C. CLARK,
Attorneys for Defendant, Petitioner for said Writ.

[Endorsed]: Petition for Writ of Error. Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [158]

In the District Court of the United States, District of Arizona.

No. 56–PRESCOTT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the above-named defendant, Navajo County, by its attorneys, and files the following assignment of errors, upon which it will rely upon its prosecution of a writ of error in the above-entitled cause from the judgment rendered herein on the 8th day of July, 1924.

Said defendant says that in the record and proceedings herein in the United States District Court, for the District of Arizona, there is manifest error, to the great prejudice of the defendant, in this, to wit:

1. That the United States District Court for the District of Arizona erred in overruling defendant's objection to the introduction of plaintiff's Exhibit

No. 1, being the call for bids of Navajo County for the construction of certain bridges, upon the ground that it was immaterial, it appearing that long after that call was made a contract was signed with full specifications and that a mere proposal for bids would have no bearing whatsoever on that contract one way or the other, no matter what it might be. [159]

2. That said District Court erred in overruling defendant's objection to what purported to be a copy of an original report addressed to the Supervisors of Navajo County, and purported to be signed by Chas. E. Perkins, County Engineer, and introduced as plaintiff's Exhibit 4, for the reason that it was a copy. That no foundation had been laid for the introduction of secondary evidence. That it bore neither date or signature or was it in anywise identified as an official report. That it was irrelevant, incompetent and immaterial. That it imported no verity or authenticity. That although purported to have been made by the County Engineer, he was not authorized to speak for, or bind, the Board of Supervisors in any way at that time.

A copy of said exhibit is hereto attached and marked Plaintiff's Exhibit 4.

3. That the said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to Wallace Ellsworth, the Clerk of the Board of Supervisors of Navajo County, called as a witness for the plaintiff:

"Mr. STONEMAN.—Uuder what date of the meeting of the Board of Supervisors is that minute entry made?

A. Under date of August 7, 1916.

Q. Read that into the record.

Mr. CLARK.—Now, if the Court please, we shall object to that on the ground that it is irrelevant, incompetent, and immaterial and that on its face it was a minute of the Board of Supervisors made prior to the execution of the contract between the plaintiff and defendant here and that different conditions may have been talked of or discussed or placed of [160] record prior to that time having no bearing on the contract itself and are no part of it and, therefore, ought not be admitted in evidence unless shown in the contract itself.

The COURT.—What does it purport to be?

Mr. STONEMAN.—The purport of it is that the bid of Mesmer and Rice, being the best bid, is accepted and approved subject to the approval of the contract, specifications and plans by the United States Indian Department.

Mr. CLARK.—We think your Honor can see that it is immaterial. The contract or the bid must have been accepted or there would have been no contract and, if the latter part of this, which refers to the Indian Department, is in the contract itself, which it is not, then this might shed some light on it but, inasmuch, as it is not and everything pertaining to the Indian Department was carefully stricken from the

contract before signing, we say this can have no bearing.

The COURT.—Don't you put them upon proof by the allegations of your answer as to the very subject of the execution of this contract?

Mr. CLARK.—Not as to anything prior to the date of the contract itself and we confine our answer to that. There are certain allegations in the complaint as to what transpired afterwards, which, of course, are material and we have denied those in so far as we have seen proper. In any event, he would not be put to proof of any immaterial matter.

The COURT.—No. The objection is overruled.

To which ruling counsel for defendant then and there excepted and the witness read the record in question as follows:

'A. The bid of Mesmer & Rice of Los Angeles, California, being lowest and best bid received for the construction of bridge across the Little Colorado River near Winslow at a cost of $23,800.00, the same is accepted and approved subject to approval of contract, specifications, and plans therefor by United States Indian Department, which department expects to pay one-half of the cost of construction of same bridge."

4. That the said United States District Court erred in overruling defendant's objection to the cross-examination by counsel for plaintiff of R. C.

Creswell, formerly a member of the Board of Supervisors of Navajo County, and called originally by plaintiff for the purpose of cross-examination under paragraph 1680, R. S. A., 1913, [161] which paragraph reads as follows:

> "A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination, at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony. Such witness when so called may be examined by his own counsel, but only as to the matters testified to on such examination."

for the reason that said witness was not then a supervisor, that he was in no official position of any kind or character and that anything he might testify to at that time should proceed under the usual rule as plaintiff's witness without the right of cross-examination; that when the official relation has ceased one who has been an officer may be made a witness only as other witnesses. That the witness was then a private citizen not bound by official sanction.

Whereupon, the following colloquy occurred:

"The COURT.—Well, the rules of evidence in the state courts do not apply in the Federal court.

Mr. STONEMAN.—No, I know that.

The COURT.—Q. During all of these proceedings, Mr. Creswell, were you a member of the Board?

A. Yes, sir. That is, during the time the contract was being let and settled up.

The COURT.—You are offering him for cross-examination?

Mr. STONEMAN.—Yes, sir. I don't want necessarily to be bound. I don't know what he is going to say. I never talked to him, being an adverse witness.

The COURT.—You are merely going to examine him as to this contract and his participation in it?

Mr. STONEMAN.—Yes, sir. [162]

The COURT.—Well, the objection will be overruled. However, you will be limited to that contract and matters that occurred before he retired from the Board.

Mr. STONEMAN.—Yes, sir.

To which ruling counsel for the defendant then and there excepted.

THEREUPON said witness testified among other things, as follows:

'Mr. STONEMAN.—Q. Mr. Creswell do you remember receiving during the month of September or perhaps October, 1916, a letter ad-

dressed to you as chairman of the Board of Supervisors by E. B. Merritt, Assistant Commissioner of Indian Affairs? A. Yes, sir.

Q. Would you recognize a copy of the letters, if you saw it? I hand you what we think is a copy of the letter and ask you if you received the original?

A. Yes, sir. I think I received the original of that, if I remember.

Q. Do you know where the original is, Mr. Creswell? A. No, sir, I do not.

Q. You left, I suppose, with the Board of Supervisors?

A. Well, I either left it there or a copy there. This was sent direct to me at Winslow.

Q. Did you communicate the contents of that letter when it was received by you to the Board of Supervisors? A. Yes, sir.

Mr. STONEMAN.—We offer this in evidence now and ask that it be marked Plaintiff's Exhibit 6.

Mr. CLARK.—That has been marked plaintiff's exhibit already.

Mr. STONEMAN.—That has been marked plaintiff's exhibit for identification.

Mr. CLARK.—We object to it on the ground that it is immaterial and hearsay.

The COURT.—Q. How did you get it—through the mail? Did it come to you through the mail? A. Yes, sir.

Mr. CLARK.—Please add to that objection that it is incompetent. [163]

The COURT.—Objection is overruled.

To which ruling of the Court the defendant then and there excepted.'

THEREUPON said purported letter was admitted in evidence as Plaintiff's Exhibit No. 6, and is hereto attached as such exhibit duly numbered for identification.

WHEREUPON said witness further testified as follows:

'Mr. STONEMAN.—Q. I hand you what purports to be a copy of a communication dated at Holbrook, August 9, 1916, addressed to the Board of Supervisors of Navajo County, purporting to be signed by Thomas F. Nichols for the State Engineer, and ask you if you ever say the—ask you to examine this copy and state whether or not you ever saw the original of it?

A. It has been so long that I don't know whether I could recall the exact wording but he made such report I know. (Witness reads document.) As far as I know, I think it is a copy of the report from Mr. Nichols, State Engineer.

Mr. STONEMAN.—We offer this copy to which the witness has just testified and ask that it be marked as a plaintiff's exhibit with the appropriate designation.'

(Counsel for plaintiff asked counsel for defendant if they had the original of this report, and were informed that they did not.)

The copy to which the witness had just testified was then offered in evidence, to which offer counsel for defendant objected on the ground

that on its face it was a report made prior to the filing of the contract. That all prior matters were deemed to be incorporated in it. That it was immaterial, irrelevant and incompetent; that it is hearsay as it stands, without authenticity. Which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON said copy was admitted in evidence as Plaintiff's Exhibit 13, a copy of which exhibit duly numbered for identification is hereto attached and asked [164] to be read and considered as a part hereof.

THEREUPON the plaintiff offered in evidence further testimony on the part of said witness as follows:

'Mr. STONEMAN.—Q. When did you see the demand that I filed on behalf of Mesmer and Rice with reference to the time that some kind of a meeting, legal or otherwise, was held by the Board of Supervisors on or about the 23d day of May, 1918?

A. Well, I don't remember those dates at all.

Q. You remember the meeting being held, don't you?

A. I remember hearing them talk about it, yes, but I say, I don't remember being at that meeting.

Q. Who talked to you about it?

A. I think Mr. Owens did.

Q. What did Mr. Owens say?

To which question the counsel for defendant

then and there objected on the ground that it was hearsay and immaterial. His objection was by the Court sustained.'

THEREUPON the following question was propounded by counsel for plaintiff.

Q. How did Mr. Owens or Mr. Freeman happen to speak to you at all about it, do you know?

To which question counsel for defendant made the objection that it was immaterial and that it called for a conclusion. Which objection was by the Court overruled. To which ruling, defendant then and there excepted and the witness thereupon testified as follows:

'A. Well, as I remember, Mr. Owens remarked that Mr. Stoneman was over there and wanted to reopen that case of Mesmer & Rice, and they could not see any necessity of reopening it. They said they had paid them in full.

Q. How did you first acquire any information as to whatever was done at this meeting?

To which question counsel for defendant objected on the ground that it was immaterial.

WHEREUPON the following colloquy ensued: [165]

'The COURT.—He might have acquired the information from the record.

Mr. CLARK.—Then it would be more objectionable. It would be pure hearsay if he received it from a record. The record would be the evidence.

The COURT.—Do you contend that the Board of Supervisors or any other board or

public body may hold a special meeting and solemnly transact business that affects the rights of individuals and fail to record it and preclude the party from proving it after they have acted upon it.

Mr. CLARK.—No, sir, and we say that nothing of this kind has been done by this Board at any time. We will make this suggestion. First, that this meeting was not a meeting of the Board of Supervisors as such. It was called as a mere conference at Mr. Stoneman's request and the telegram upon which it was based was dated the 19th day of May, 1923, and this meeting was held at his request on the 23d, only four days between the date of the telegram and the date of this meeting. Now at this meeting, your Honor, the Board of Supervisors could not legally have taken any action upon any claim to the prejudice of this plaintiff. The statutes require that every claim be presented at a regular meeting, not a special meeting. A special meeting may not be held for the purpose of considering a claim and we think counsel is aware of that and, if no action was taken at that meeting, it was because among other things, that the claim was presented to the Board for the first time then and at a special meeting, at which they could not legally consider it. Now, I am not saying what counsel may have understood. I am stating the situation as it is your Honor, and we are within our rights in objecting to all of this testimony.

We haven't a scrap of paper nor a word of testimony as to anything that happened that is not wide open to counsel and I think they too appreciate that. If certain things are gone, they are gone from us as well as from him.'

Which objection was by the Court overruled.

To which ruling defendant then and there excepted and the witness was then permitted to testify as follows:

A. Well, just as I stated, I think Mr. Owens told me he had been over there—that Mr. Stoneman had been over there to Holbrook and talked with him and Mr. Freeman over this claim of Mesmer & Rice.

The COURT.—Mr. Creswell, you called that special meeting, did you not?

A. I sent that telegram that I got from Mr. Stoneman to the Clerk and asked him to 'phone the other two members.

Q. Yes, and they were all present?

A. The other two were present, but I can't recall to my mind that I was there. [166]

Q. You say you were not there?

A. I don't think I was there, Judge.

Q. Do you know that you were not there?

A. No, I was not there."

5. That said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to C. E. Owens, a member of the Board of Supervisors of Navajo County, who had been called originally by

plaintiff for cross-examination under paragraph 1680, R. S. A., to wit:

"Mr. STONEMAN.—Q. That was the meeting at which the warrant for $6,204.00 was paid?

A. Well, I don't remember as to the date. I remember that meeting, yes.

Q. Now, the $6,204.00 was a part of the amount that has been claimed by Mesmer & Rice before December 3, wasn't it?"

upon the ground that the question called for a conclusion of the witness and that the transaction must speak for itself from the record as made.

"THEREUPON said witness was permitted to testify as follows:

A. This $6,204.62 was the final payment that was due, according to our understanding on the contract on that bridge and this was the demand that we approved and paid.

Q. Now, prior to that time, this demand of November 5, had been presented, hadn't it, and you rejected it? A. Yes, sir.

Q. I am handing the witness Plaintiff's Exhibit 10.

(Being the demand filed by plaintiff against the defendant county on November 5, 1917.)

Now, isn't it true, Mr. Owens, that the $6,-204.65 that was finally paid to Mr. Mesmer on December 3, 1917, was intended to—by the Board of Supervisors to be a compromise and a settlement of [167] all the money that had

been demanded by Mesmer & Rice in November or at any previous time?

A. No, sir, I do not understand it that way.

Q. How do you understand it?

A. I understand that $6,204.00 was the last payment due on the contract and the reason that we rejected this thing because there was no evidence there to show us where these things were placed. There is nothing attached to the demand to give us any evidence why we should pay that extra amount."

6. That the said United States District Court erred in overruling defendant's objection to the following question propounded to the said witness C. E. Owens during the cross-examination last above referred to, to wit:

"Q. But you knew that the $6,204.00 which you allowed on December 3 was included in the demand of November 5, didn't you? What was your answer?"

for the reason that it must appear, if it appears at all, from the face of the demands that the statute requires that these demands be itemized, stating minutely what each item is for and assuming that they have followed the law, it will appear from the face of these demands whether the last one on December 3d includes any part of those theretofore presented and objected.

Thereupon counsel for plaintiff changed the form of his question to read as follows:

"Mr. STONEMAN.—Q. Now, didn't that claim of November 5 include the amount of

money which you admitted you owed him, $6,204.62?"

To which question defendant interposed the objection already made, together with the further objection that the question calls for a pure conclusion of the witness.

Thereupon the following colloquy occurred:

"Mr. STONEMAN.—I will change the question, Mr. Clark.

Q. Didn't you so understand on December 3 that that $6,204.62 was included in one or the other—in the demand of November 5?

Mr. CLARK.—That is already objected to. We certainly object to it. An understanding is something so intangible [168] we can't reduce it to this record. It must appear by the face of those demands whether or not the later demand of December 3 was included in any portion of the former, and if the demands were properly made, and I am assuming that they are, they will so show one way or the other.

The COURT.—If this witness knows, why can't he testify to it?

Mr. CLARK.—He asks him to testify to an understanding which understanding must appear from the face of the demands themselves under the legal rule.

The COURT.—Well, the first question was—he asked him if it was not included and it was not part. He changed the question.

Mr. CLARK.—That is the thing that this

Court should determine from an inspection of the demands themselves whether it is or not.

The COURT.—Well, I may not be able to determine.

Mr. CLARK.—Then this witness surely, we claim, would not have the right, if the demands were put in such shape that this Court could not determine it—we ought not to be bound by the fallacious conclusion, as we think it would be, of any witness.

Mr. STONEMAN.—May it please your Honor, I withdraw that question and ask him questions with regard to the claim of October 1.

Q. The amount of $6,204.00 which you paid to Mr. Mesmer on December 3, 1917, was included in the demand of October 1 or, in this case, Plaintiff's Exhibit 9, was it not?

Mr. CLARK.—That is the same question in slightly different form and we object to it upon the same grounds."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted, and the witness was permitted to answer as follows:

"A. Well, whether that part of it was included in that or not, I can't say at the present time but these demands were fixed up in such a way that we as Board of Supervisors did not feel like we have a right to honor them and therefore, we reject them as they was in the whole amount.

Mr. STONEMAN.—Q. Why did you reject

the demand of October 1 with the items of the different amounts claimed?

Mr. CLARK.—Well, now, we object to that.

Mr. STONEMAN.—In what respects does not—did it warrant the action of the Board of Supervisors?

Mr. CLARK.—The witness has answered that question once. [169]

The COURT.—He has asked as to November 5 but he has not as to October 1.

Mr. STONEMAN.—That claim of October 1, as your Honor will recall, was deferred—the action on it was deferred until November.

Mr. CLARK.—Yes, that is the record. Now, in the first place, in support of our objection, we say that the witness no supervisor is bound to give a reason for the rejection of a claim; that their reason ought to appear from the claim itself and we say that it does appear plainly on the face of this demand.

The COURT.—I don't know of any rule that would preclude him from giving his reasons. If he knows why the Board acted in the way in which it did, I think he has a right to testify. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Our reasons for rejecting this demand is the same as the other. There is nothing there to satisfy the Board as to the evidence of these things that were passed on there. There

isn't an O. K. there of the inspector or nothing attached to that bill where they incurred that extra expense and we could not honor a demand like that."

7. The said United States District Court erred in overruling defendant's objection to the following question propounded to the said witness, C. E. Owens, in the course of the cross-examination last above referred to:

"Mr. STONEMAN.—Well, you refer only to the extra expense. How about the structural steel, 147 tons at $120.00 a ton, amounting to $17,640.00? What is the objection to that?"

(The item referred to in the demand of Oct. 1, 1917 (Plaintiff's Exhibit 9) is not charged for therein as an extra but as material delivered as per original contract.)

for the reason that if there were any informality or defect in the demand it was not the fault of defendant. That if a certain number of tons of steel were charged for in that demand, before the Board could pay it there would have to be a showing by some agency or direction of the County Engineer, showing how much steel would have been required under the contract or under the proposal, so that if [170] plaintiff had furnished more that would show why demand was made for so many tons of steel.

The witness was thereupon permitted to testify as follows:

"A. Because the demand was not itemized sufficiently and it claimed more money on there

than they were entitled to and we demand an itemized demand."

8. The said United States District Court erred in refusing to strike from the record Plaintiff's Exhibit No. 17, being a purported demand presented by the plaintiff to the Board of Supervisors or to certain members of the Board on the 23d day of May, 1918, on the ground that the alleged statement or demand is not itemized as required by the statutes of Arizona. Secondly, that at the time it was presented there was no indebtedness of any kind or character on the part of Navajo County to this plaintiff. Third, that this claim is not sued upon or mentioned in any way in the complaint as will appear by reference to page 10 of the amended complaint wherein it is stated that the demand of this plaintiff was presented on or about the 3d day of December, 1917. That there is no showing in the complaint that this demand was ever presented or filed within six months from the time the alleged claim, or any item in it, arose. Lastly, that it is irrelevant, incompetent and immaterial.

The introduction of said exhibit was thereupon allowed to stand and a copy of same is hereto attached, properly marked as Plaintiff's Exhibit 17.

9. The said United States District Court erred in overruling defendant's objection to the following question propounded to R. S. Teeple, witness called in behalf of plaintiff, to wit:

"Mr. STONEMAN.—Q. Do you remember seeing a demand presented by Mesmer and Rice on May 17, for $17,856.00 upon which that war-

rant was paid and shown by what purports to [171] a carbon copy of a demand, which I hand you?

The COURT.—Is that 1917?

A. Yes, sir. I believe I recollect this, Mr. Stoneman. I can't say as to those figures.

Q. Now, wasn't it upon this demand that that warrant of $10,000 was issued?

A. That is my recollection, although a new demand might have been made out.

Q. You recollect that it was this. We offer this in evidence upon the identification of it by this witness and ask that it be marked a separate exhibit."

for the reason that it as irrelevant, and incompetent and that the complaint is not based either wholly or in part upon any demand of May 17, 1917.

Thereupon Mr. Stoneman, for plaintiff, made the following explanation:

"Mr. STONEMAN.—It is offered not for the purpose of that—that purpose at all. It is offered for the purpose of showing that the Board of Supervisors has, at least in this instance, made an allowance upon—without a separate demand covering the amount allowed being presented."

Said purported demand was thereupon admitted in evidence properly marked and numbered for identification.

X.

10. That said United States District Court erred in sustaining the motion of plaintiff to strike the

following testimony of the said witness R. S. Teeple, upon defendant's cross-examination of him respecting the demand of plaintiff against Navajo County, dated December 3, 1917:

"A. Now, calling your attention, Mr. Teeple, to the line starting with the word "less" purported to be credits on this demand, opposite which is a total of $17,000.00, as I remember it?

A. Yes, sir. $17,600.00.

Q. $17,600.00 is right. Now I will ask you if that amount does not include all payments of every kind and character theretofore made by the Board of Supervisors to the plaintiff on this bridge?

A. It was so intended. [172]

Q. I am asking you if it does not?

A. It does, yes."

Upon plaintiff's objection to said question on the ground that the witness was not qualified to answer, although it appears in the record that on December 3, 1917, the witness was the Clerk of the Board of Supervisors of Navajo County.

11. The said United States District Court erred in sustaining the motion to strike of plaintiff, certain testimony of the said witness, R. S. Teeple, as to additional work done upon the bridge in question by the County in order to complete it.

Upon the ground that it is contrary to the record made in this case, in that the record shows in this case that the plaintiff claims the payment of $6,204.00 in final acceptance and payment of all demands upon the construction of that bridge, and that it is

incompetent for the purpose of disputing the record that the Supervisors did accept the bridge and finally paid for it. Said testimony being so stricken, was as follows:

> "A. On the east side, a long piling or trestle approach was constructed. On the west end, another steel span and on the west or south bank of the river piling driven in and protection work to keep it from washing, and dirt approaches also on the west end, and perhaps, some dirt on the east end. This extra steel span was built by the Omaha Structural Steel Bridge Co. and it followed the work done by Mesmer & Rice, and that work was necessary to complete the bridge so that it could be used."

12. The said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff, Louis F. Mesmer, while testifying in his own behalf upon direct examination, as to certain conversations alleged to have occurred about August 8, 1916, and prior to the execution of the contract in question which [173] was made on September 5, 1917, said conversation purported to have been made with C. E. Perkins, County Engineer:

> "Mr. STONEMAN.—Now, then, what conversation, if any, led up to the ——— and what reasons were there why the payment for the additional work suggested by the County Engineer should not be included in the $23,800.00? In other words, I mean why was it the provision put in there that the substructure should be

constructed according to the *addenda* rather than that it should come out of the $23,800.00?"

Upon the ground that it involved something that could only be determined by the Board of Supervisors and anything that the County Engineer might have said as to that could not be binding upon the defendant at all. That it was incompetent for purpose offered or for any purpose.

13. That said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff during the same examination last above referred to:

"Mr. STONEMAN.—At that time did Mr. Perkins say anything to you about the possibility of further changes by reason of the requirements that might be made by the representative of the Indian Department?"

Upon the ground that additional quantities required before the contract was made and signed, and particularly before any construction had started were immaterial. That they were not matters coming within what counsel calls *addenda.* For the reason that all of these things to which the witness has just testified as being additional quantities and sizes, are in terms set forth in the contract and that plaintiff was to furnish each one of these things so mentioned and which are mentioned in the report of the County Engineer and in the report of Mr. Nichols. For the further reason that the *addenda* to which counsel has referred contains this provision, which is in the contract as well as in the proposal:

"If, after construction has commenced it appears that additional quantities are required, they [174] shall be paid for as follows": and that the contract itself provides that the *addenda* shall only become effective after construction is commenced, if it be apparent that additional quantities are required.

14. The said United States District Court erred in denying defendant's motion to strike the following testimony:

"Mr. STONEMAN.—Well, what influence did it have and why was the phrase 'as per *addenda* for extras upon proposal accepted' inserted in the contract as finally signed, in so far as the substructure work was concerned?

A. So that any alterations made in the substructure other than—over those that were shown on the original plans would be paid for as per the unit prices shown in the *addenda.*"

On the ground that the answer was a conclusion by way of interpretation of the contract which forestalls the Court in its construction. The contract being clear, plain and unambiguous.

15. That the said United States District Court erred in denying defendant's motion to strike the following testimony:

"Mr. STONEMAN.—Was there any attempt by either of you or Mr. Perkins at that time to reach a figure as to what additional money would be required to construct the bridge according to the suggestions of the County Engineer?

A. Yes, the quantities, the cubic yardage of concrete was figured, the number of extra piles was figured, the amount of reinforcing bars was figured, the amount of structural steel required was figured and all of the various items that go to make up the alterations were estimated and they were added on the contract price of $23,-800.00 and then that amount subtracted from the total amount of $28,000.00—figured 28,-000.00 and some odd plus 15,000.00, to see whether those alterations from the total cost was inside of the available money for the work."

On the ground that said answer was wholly unanticipated, irrelevant, incompetent and immaterial. [175]

16. That the said United States District Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 21, purported to be a plan showing the difference between the plans and specifications upon which the bid was submitted, and the plans and specifications upon which it was agreed the substructure should finally be built. Upon this offer the following question was propounded and the answers following said questions were given:

"Q. Are these the plans that you have testified to as showing the changes in the substructure from the plans of construction of the substructure that was included in your bid?

A. They are. They show the difference be-

tween the two river piers on the original plan as proposed and as built."

The objection was upon the ground that it did not appear from anything the witness had stated that the offered plan is anything more than one prepared by Mr. Popert. That it does not show that the County Engineer had anything to do with it.

Whereupon, the Court made the following observation:

"The COURT.—No, it does not show it was submitted to him or made with his approval or changes were suggested—

Mr. STONEMAN.—It is not offered for that purpose, if your Honor please. It is offered for the purpose of in a little while of forming the basis of the computation of the extra cost under the flat charges of the additional steel and concrete in place required by the changes.

The COURT.—You expect to show that the work was done in accordance with these plans and changes?

Mr. STONEMAN.—Yes, sir."

Thereupon counsel for defendant added to its objection that the offered exhibit would be self-serving and not under the authenticity or approval of the County Engineer or anyone else who might bind the County, and would be in the nature of hearsay as well as incompetent. [176]

Thereupon, notwithstanding said objection, said Exhibit 21 was admitted and the witness was per-

mitted to testify fully regarding the same, and the computations based thereon.

17. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by plaintiff's counsel:

> "Mr. STONEMAN.—In answering the next question, I will ask you, please, always, in each instance, Mr. Mesmer, give the cost first of the construction under your own plan and specifications and then give the added cost as shown by the changes required by the County Engineer, if you can do that."

Upon the ground that in the contract there is a certain substructure definitely and specifically provided to be built by the plaintiff for Navajo County, and that the words in the contract: "substructure to be as follows: as per *addenda* for extras upon the proposal accepted" refer only to extras beyond the substructure that is definitely contracted to be built in the contract, no part of which is designated as an extra. That this provision as to extras has no application except to things added to the contract after actual construction shall have commenced, and that it is immaterial. Notwithstanding said objection, the witness was permitted to testify fully to comparative costs.

18. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

"Mr. STONEMAN.—Q. Well, start in on the morning of that day (December 3, 1917), and tell the Court, as far as may be permitted to tell, what happened, and what was done between you and Mr. Popert and the Board of Supervisors."

On the ground that the plaintiff is precluded by the receipts, which is a final one, and by his undertaking of the [177] indemnity given on that date and by all of the circumstances surrounding this case. That the receipt constitutes, or that demand and the warrant for its payment constitutes a full and final payment of all demands.

Notwithstanding said objection, the witness was permitted to restate fully the version of what happened before the Board of Supervisors on December 3, 1917.

19. The said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff, Louis F. Mesmer, by his counsel:

"Mr. STONEMAN.—Q. Wasn't the matter being discussed between you and the Board of Supervisors, as to whether or not the Board of Supervisors, should pay the whole of the claim as it was included in the demand of November 5, or whether they should pay part of it, or whether they should stand upon their original rejection of the whole claim?"

On the ground that it was leading. Which objection was by counsel for plaintiff then and there

confessed, following the comment of the Court that it was leading. Notwithstanding said objection the witness was permitted to testify as follows:

"A. The Board would only pay the amount necessary to complete the original plans and specifications, and they agreed to pay the other extras with the exception of the Nichols —or the Perkins' extras, which they would not pay, so that the money that they allowed was in—was an application of first—on the former.

Q. Well, what I want to know, what was being discussed was it a previous demand or was it?

A. Well, we were discussing the extra work involved in November—in the November discussion. All of the extra work had been completed before.

The COURT.—Q. November claim?

A. Yes, the extra work had been completed then.

Mr. STONEMAN.—Was the amount of $6,204.62, which you finally accepted on December 3, an amount that was included in the November demand?

A. Well, part of it was, yes." [178]

20. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

"Mr. STONEMAN.—Q. Do you know why the words, 'together with extras herein listed' was placed in there?"

(Referring to the demand of Dec. 3, 1917.)

On the ground that it called for a conclusion and that the instrument itself is susceptible of easy interpretation.

Thereupon, the following proceedings were had:

"Mr. STONEMAN.—The witness says that he directed that to be put in there.

Mr. CLARK.—I understand that he did.

The COURT.—Yes, but the instrument itself does not show why that language was used. I think it is proper evidence in explanation of the document. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Yes, the reason for that wording was to differentiate the extras mentioned and specifically enumerate here from the Merritt extras or the extras involved by reason of changes in the plans at the specific request of Mr. Merritt of the Indian Department and the extras involved by reason of the changes in the plans at the suggestion of Mr. Perkins."

21. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel, upon redirect examination:

"Mr. STONEMAN.—Mr. Mesmer, can't you

put the conditions under which you state that you were paid $6,204.00 by the Board of Supervisors on December 3, 1917—Will you please state to me again your understanding of the conditions under which that payment was made and how you accepted it?"

Upon the ground that is was not proper redirect; that it had been fully stated by this witness more than once what his understanding was in both direct and cross-examination. [179] That it called for a conclusion of the witness. That there was not any ambiguity in the contract. That it is susceptible of easy interpretation and speaks for itself.

Notwithstanding said objections the witness was thereupon permitted to testify as follows:

"A. The Board—I will give in conclusion this thing The Board said to me as follows: 'We will give you the difference between the amount of $23,800.00 and the amounts we have already paid you, and in addition thereto, we will give you the Dubree extras and we will give you the Merritt extras, but we won't give you the extras involved by reason of Perkins' changes' and I said: 'Gentlemen, that won't do. I will tell you what I will do. I will take the difference between the $23,800.00—'

Q. $23,000.00?

A. Yes. '—and what you have already paid me and the Dubree extras but I won't take the Merritt extras, because it will cloud the

question of the Perkins' extras, which are involved with, and a part of, you might say, of the Merritt extras. It is difficult between the two lines to draw just where Merritt's and Perkins' come together."

22. The said United States District Court erred in denying the following motion to strike made at the conclusion of the examination of the said Louis F. Mesmer, plaintiff:

"Mr. CLARK.—Before any further testimony is put on, we desire to move that all of the testimony of Mr. Mesmer as to the value of these extras claimed by him be stricken on the ground: First, that all those things that he set forth of what was required by the Indian Department are provided for in the contract itself; secondly, on the ground that no demand covering these extras, as testified to by Mr. Mesmer, was filed with the County of Navajo in the manner and form as required by the statutes of Arizona within six months from the date of the last item."

23. The said United States District Court erred in overruling defendant's objection to the following question propounded by plaintiff's attorney to W. H. Popert, witness for the plaintiff:

"Mr. STONEMAN.—Could the bridge have been constructed for $23,800.00 exclusive of these modifications." [180]

upon the ground that it was immaterial.

Thereupon, after several intervening questions

and some discussion the witness was permitted to, and did, answer "No."

24. The said United States District Court erred in overruling defendant's objection to the following question propounded to W. H. Popert, witness for the plaintiff:

> "Mr. STONEMAN.—Q. Now with reference to the phrase, as it appears in the contract by Plaintiff's Exhibit 3, 'substructure to be as follows: as per *addenda* for extras upon the proposal accepted.' Do you know how that phrasing happened to be inserted, not only in this memorandum, being Defendant's Exhibit 'A,' but finally in the contract? Do you know? Say yes or no, please. A. Yes, I know.
>
> Q. Now, go ahead and tell the reason why."

Upon the ground that is was immaterial. Notwithstanding said objection the witness was permitted to testify as follows:

> "A. As I remember, in the original pencil draft, of which this is, I believe, a copy, we wanted to be sure that any materials to be furnished above that shown on the original blue-print and called for in the original proposal should be paid for irrespective of the description which might follow here. I can't say whether I inserted this or the Engineer or the Attorney but it was agreed upon at that time in the conference that these words should appear in the contract or words similar in effect which would be satisfactory to the County Attorney. Does that answer the question?"

25. The said United States District Court erred in overruling defendant's objection to the following question propounded to the same witness, W. H. Popert, during his direct examination:

> "Mr. STONEMAN.—Is there any reason why it was not possible at that time to say that the bridge should be built for $23,800.00, or for any other sum?"

On the ground that it called for a conclusion.

Notwithstanding said objection the witness was permitted [181] to testify as follows:

> "A. The proposal called for the construction of a particular bridge for a particular price. It was known that there would be certain modifications to be made. It was not possible to anticipate those modifications before the contract was executed. Further, the contractor believed that it would not be legal to modify the price named in the original proposal."

26. The said United States District Court erred in overruling defendant's objection to the following question asked of said witness, Popert, upon his direct examination:

> "Q. Was there any discussion between you and Mr. Mesmer and Mr. Perkins, the County Engineer, as to the meaning of the phrase 'substructure as per *addenda* for extras herewith'?"

On the ground that it was immaterial, that being a legal matter by which the county of Navajo could not be bound. Notwithstanding said objection the witness was permitted to testify as follows:

"A. Well, in order to save the time, I will make my answer as brief as possible. The sum and substance of the discussion was that if there should be any alterations—any additions to the original plan and bid that they should be paid for as provided by the proposal."

27. The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

"Mr. STONEMAN.—Was there any question at that time expressed by Mr. Perkins—any claim by him that Mesmer & Rice were to construct this bridge with these changes suggested by him for the sum of $23,800.00?"

On the ground that it was leading and immaterial.

Notwithstanding said objection said witness was permitted to testify as follows:

"A. I will say that the understanding was that whatever additional material was required to that called for in the original plan and bid would be paid for."

28. The said United States District Court erred [182] in overruling defendant's objection to the following question asked of said witness, Popert, on his direct examination, by counsel for plaintiff:

"Mr. STONEMAN.—Did Mr. Perkins say anything to you before the contract was signed as to whether or not he understood that the substructure commencing in the paragraph of

Plaintiff's Exhibit 3, being the contract where 'substructure' is used, *where* to be paid for at the unit prices or were to be paid for as per *addenda* for extras or were to be paid for out of the flat sum of $23,800.00?"

On the ground that it called for a conclusion, that it was hearsay and immaterial. Notwithstanding said objection said witness was permitted to testify as follows:

"A. In a few words, the extra material as roughly described in contract for the substructure, extra material over that shown on the blue-print, 4183, should be paid for at the unit prices specified in the proposal. Well, I am trying to save my words and time as much as possible."

29. The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

"Mr. STONEMAN.—Have you made a calculation, Mr. Popert, of the different items of materials used in the substructure for the purpose of showing the cost of the substructure based upon prices used in the contract, under the *addenda* clause. Have you made a calculation, yes or no?

A. Yes, I have.

Q. Will you read into the record the result of that calculation.

Mr. CLARK.—Are you asking (items) unpaid for to be read into the record?

Mr. STONEMAN.—Yes."

On the ground that it was immaterial and a matter to be determined by the Court itself.

Notwithstanding said objection the witness was permitted to testify at length as to the result of his calculations. [183]

30. The said United States District Court erred in overruling defendant's objection to the following question propounded on the 20th day of March, 1924, to the witness, Popert, on redirect examination:

> "Mr. STONEMAN.—Have you made a computation for the purpose of showing the cost of the material used in the construction of the bridge under the requirements of Mr. Perkins?
>
> A. I have.
>
> Q. Is it itemized as to the different character of material? A. It is.
>
> Q. Will you please give me the results of your computation?"

On the ground that it was immaterial, as the matter was already settled by the contract and because no demand was ever presented to the Board of Supervisors within six months from the furnishing of these items.

Notwithstanding this objection the witness was permitted to testify as to the items embraced in his computation, showing a total of $13,900.00.

31. The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, by counsel for plaintiff:

"So that, until those supplemental plans and specifications had been approved by the Indian Department it was not possible was it, under the contract itself, to determine what either the extent of the changes, which in this case have been called extras, or the quantity or amount of the changes?

A. No, it was not possible to determine that.

Q. Now, did that consideration have anything to do with the wording of this clause of the contract as it was worded, that is, that all of the preliminary specification stated in the contract were to be paid for as per *addenda* for extras upon the proposal accepted?"

Upon the ground that it was immaterial and because that very phrase, the so-called *addenda* phrase, is in the bid and proposal of this plaintiff, made long before this contract, [184] or any part of it, was ever made.

32. The said United States District Court erred in overruling the defendant's objection to the following question propounded by counsel for plaintiff to said witness Popert:

"Q. That November claim appears to be divided into two parts, one part according to the interpretation of the contract placed upon it by the Board and the other part according to the interpretation placed upon the contract by Mr. Mesmer. Is that true and was that intended by you to be shown?

Mr. CLARK.—Are you speaking of the demand of November 5?

Mr. STONEMAN.—Yes, sir.

Mr. CLARK.—Well, we object. It is immaterial.

The COURT.—It speaks for itself?

Mr. CLARK.—The demand shows upon its face just what it is."

Notwithstanding said objection the witness was permitted to testify as follows:

"That is correct—If you mean that the second paragraph should be in with the first paragraph in the contractor's interpretation—the two should be added together."

33. The said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to the witness Popert:

"Mr. STONEMAN.—Did you hear at that meeting on December 3 any member of the Board of Supervisors offer to pay any additional money to the Merritt Extras and the sum of $6,204.00?"

Upon the ground that it was immaterial and that whoever made such statement offered it as a compromise that was unaccepted, proof of which would be inadmissible in any event.

Whereupon, counsel for plaintiff stated as follows:

"Mr. STONEMAN.—It is not for that purpose. It is for the purpose of showing that it was the November demand which was in contemplation and being considered."

Notwithstanding said objection the witness was [185] permitted to testify as follows:

"A. Your Honor, I can save time by saying, while I don't remember the exact name, I know that the Board felt as though they wanted to pay something—they wanted to do something to have the contractor satisfied and one of the members of the Board said that he would pay a thousand dollars extra and asked if that was satisfactory to Mr. Mesmer. Does that answer your question?"

34. The said United States District Court erred in sustaining the objection of plaintiff to the following question propounded by counsel for plaintiff to said witness Popert, upon cross-examination:

"Mr. CLARK.—Did you have anything to do, Mr. Popert, with preparing or assisting in the preparation of the original bill in equity that was filed in this court by Mr. Mesmer?

(No answer.)

I will put it a little differently. Q. Did you have anything to do yith furnishing the information to Mr. Stoneman upon which that bill in equity was drawn? Did you consult with him as to any of the information used by him in making up that complaint at all?"

Upon the ground that it was irrelevant and immaterial. To which objection, upon suggestion of the Court, counsel for the plaintiff added that it was not proper cross-examination, unless it is an attempt to impeach the witness, in which event no proper foundation is laid. Thereupon, counsel for de-

fendant read from paragraph 4 of said bill in equity as follows:

> "Complainant avers that under the terms of such contract he entered upon the construction of such bridge but that thereafter from time to time during the performance of the labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to require of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras as set forth in said proposal, contract and specifications."

Notwithstanding the reading of said paragraph 4, the ruling on said objection was adhered to. [186]

35. The said United States District Court erred in overruling defendant's objection to the following question propounded to R. C. Creswell, a witness in behalf of the defendant, upon his cross-examination by counsel for plaintiff:

> "Mr. STONEMAN.—Did you not know that when the bridge was finally constructed by Mr. Mesmer that it was not being constructed by Mr. Mesmer, that it was not being constructed under the proposal and the plans and specifications originally submitted to him?"

Upon the ground that the contract at that time controlled and that the contract speaks for itself as to those matters.

Notwithstanding said objection the Court then propounded said witness the following question:

> "The COURT.—Did you not know at the time this bridge was being constructed that it was not being constructed under the plans and specifications as made in the proposal of Mr. Mesmer before the contract was accepted? Before the award was made. Did you not know that the bridge was not being constructed in accordance with those plans?"

Notwithstanding the objection the witness was permitted to testify as follows:

> "A. Well, there was some little heavier parts but, as I understood from the Engineer at that time, it did not amount to but very little."

36. The said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to said witness, R. C. Creswell, during the cross-examination:

> "Mr. STONEMAN.—Didn't you know, Mr. Creswell, that Mr. Mesmer, in addition to the amount that he said that he would build this bridge for originally under his original proposal and specifications would have to pay out more money for material if he built it under the specifications as recommended by Jordan—by Perkins, your county engineer?"

On the ground that that was assumed by the contractor in his contract. That it was immaterial and a matter that was determined by the contract which speaks for itself. [187] That it was an attempt to have this witness interpret the contract.

Notwithstanding said objection the witness was permitted to answer saying "No." That it was his understanding that they were to build a bridge for the contract price of $23,800.00.

37. That said United States District Court erred in denying defendant's motion for judgment filed herein and served upon counsel for plaintiff on the 21st day of May, 1924, as follows:

> "Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:
>
> 1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435 Revised Statutes of Arizona.
>
> 2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called 'extras' which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6th. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge

[188] and which were set forth in the contract, were to be *paid* for as 'extras.'

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a a 'memorandum of points and authorities,' in support of this action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant."

Said motion was denied by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plaintiff in the sum of $13,872.65, to which judgment and ruling, under and by virtue of its exception thereto, the defendant duly excepted.

38. The said United States District Court erred in rendering judgment in favor of plaintiff and against the defendant, as aforesaid, for the sum of

$13,872.65, on the 8th day of July, 1924, for all of the reasons and upon all the grounds set forth in the foregoing assignment of errors and defendant's motion for judgment.

WHEREFORE, by reason of the errors aforesaid, the defendant, Navajo County, prays that the judgment rendered and entered in this action be adjudged and decreed to be void; that the same be annulled and reversed, and that the said [189] District Court of the United States, District of Arizona, be directed to grant a new trial of this cause, or that this Court, because of said errors, cause a judgment to be entered in favor of the defendant.

THORWALD LARSON,
County Attorney.
E. S. CLARK,
NEIL C. CLARK,
Attorneys for Defendant. [190]

PLAINTIFF'S EXHIBIT No. 19.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz., May 7, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of SEVENTEEN THOUSAND EIGHT HUNDRED FIFTY-SIX and no/100 DOLLARS in payment of invoice of April 4th, for steel delivered, the items of which are heretofore annexed.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the following is a just

and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items hereunto annexed are true and correct in *very* point and particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) MESMER & RICE.

Subscribed and sworn to before me this 7th day of May, 1917.

_____.

My commission expires:

66

STEEL FOR LITTLE COLORADO RIVER BRIDGE, NEAR WINSLOW, ARIZONA.

Trusses	103	tons	
Joists	74	tons	
Railings	7¼	tons	
Cylinders	13¼	tons	
Other steel	38¼	tons	
Total	186	tons @ 120	
			$22,320.00
Less hold-back of 20% as per contract			4,464.00
Amount due.			$17,856.00

Admitted and filed Mar. 18, 1924.

C. R. McFALL,
Clerk. [191]

EXHIBIT No. 4.

REPORT OF THE COUNTY ENGINEER UPON PROPOSALS FOR CONSTRUCTION OF BRIDGES.

To the Honorable Board of Supervisors,
Navajo County, Arizona.

Gentlemen:

Responsive to your invitation for bids for the construction of bridges under the proceeds of the recent bond issue for that purpose, there were received at your office on July 3rd, and referred to the Engineer's office for report on this date, proposals from nine separate companies or individuals aggregating in the different combinations of super and substructures, fifteen hundred and forty-three distinct propositions.

This office has diligently worked and reviewed each and every one and on account of structural defects and local requirements 1260 of these proposals have been eliminated. Accompanying this report is a tabulated sheet of the remaining 283 proposals, which graphically presents and compares to you a summary which can be easily and quickly deduced. This office has likewise carefully weighed the advantages and disadvantages of the plans and these costs tabulated.

"Consultation has been made with the Engineers of the State and those of the A. T. and S. F. R. R. Company."

For the construction of the bridge near Winslow there is an appropriation of $15,000.00 conditioned

upon a like amount being appropriated and used by Navajo County, for this purpose, making a total of $30,000.00 for the bridge named which is amply sufficient to cover the cost of the super and substructures and the necessary approaches.

This office has certified to the Indian Department that the County of Navajo has appropriated and set apart the sum of $15,000 or more, which was and is available to be used for the construction of a bridge east of Winslow, and has had conversation by phone with the agent at Leupp relative to this. Mr. Janus, the agent, gives assurance that the $15,-000.00 appropriation by Congress is available, and requested that a copy of the accepted plans, specifications and construction be forwarded to him.

At this time I suggest and recommend that an invitation be extended to the Indian Department through Mr. Janus, to co-operat*ive* in the construction of the Winslow bridge by detailing an inspction engineer to act jointly with the County Engineer upon that bridge. I think this invitation essential and desirable.

Of the plans presented there are those of a six span bridge, a five span bridge, a thre span bridge, a two span bridge and a one span suspension bridge. Although except*ly* desirable at this point, the single suspension span must be eliminated from contemplation for the reasons of difficulties of constructing abutments of sufficient bearing resistance to sustain the [192] weight imposed, and that of one guy terminal falling in the center of stream bed of Cottonwood Creek.

The short spans at this point will entail excessive pier cost in preparing assured foundations which are absolutely necessary.

For the foregoing reasons this office has selected and recommends that a bridge of two spans of 200 and 48 feet, 6 inches each, as submitted and proposed by bidder No. 7 be adopted. The price stipulated is $121,115.00, with the addition of extra cost, for addition length of piling and yardage of concrete and all other items enumerated within the proposal, which with the cost of approaches will consume the total adopted $30,000.00 and more.

In comparing the relative cost of the remaining bridges advertised between the various bidders, it is found that those under No. 7 compare favorably and are the best. In fact, the total cost of the most desirable plans as made by this bidder, assuming $15,000.00 is the sum of the County money to be set apart for the Winslow bridge, is $51,863.00. The only other summary of tabulated bids which less than this stipulates a five span bridge at Winslow and the next highest which also contemplates a five span is $52,110.00; in fact, bidder No. 7 has presented the only proposal for a two span bridge.

In addition to the reasons given in the former paragraph, the expenditure for pier cost can with advantage be concentrated upon one pier at the center of the stream, where the brunt of the current, scour and force of drift are maximum.

The bridges selected and hereby recommended by this office are such as are most suitable to the respective localities, most serviceable, economical,

stable and fully meet the conditions contemplated and desired. They are as follows:

(See Tabulation Sheet No. 7.) Bridge No. 1, (T–3) over Little Colorado east of Winslow. 2 spans of 248′6″ each.

Piers to be three in number of 2 steel tubes, the center pier tubing of 72″ diameter those at each end of 48″ diameter; 12 to 16 feet below stream level with piling driven within to a refusal sufficient to sustain a load of not less than fifteen tons to each piling; tubes to be filled with a rich concrete mixture; superimposed upon these concrete-filled tubes, a reinforced concrete pier to be raised to a height of two feet above the level of the bottom chord of the adjacent A. T. & S. F. R. R. bridge. Superstructure to be two pin bow steel spans, 248′ 6″ each resting on the piers specified, 14′ roadway, steel joists, wood 3″ floor, and lattice hand rail.

The foregoing provisions are included in the proposal made.

Bridge No. 2 (T–2) over Cottonwood east of Winslow:

1 Span of 129′ resting on piers of the construction identical with the preceding, excepting that the tubing to be three in number for each pier and 36″ in diameter, piling driven 16′. The superstructure to be 1 span 129′ in length of the pin bow style, roadway 14, steel joists, 3″ wood floor, lattice railing.

Cost—$3,720.00 [193]

Bridge No. 3 (V–1) over Little Colorado near St. Joseph.

6 Spans of 84′ 4″ each resting upon piers con-

sisting of 2 steel tubes, 48″ in diameter with piles driven within in sufficient number and to the required depth to sustain the load to be imposed, tubes to be filled with a rich concrete mixture; superimposed upon these tubes to be reinforced concrete pier to the specified height. The superstructure to a pin connected steel pong trusses as designed in the proposal, 14′ roadway, steel joists, 3″ wood floor, lattice railing.

Cost—$14,775.00

Bridge No. 4 (T–1) over La Roux Fork west of Holbrook.

2–80′ spans resting upon piers identical with those designated for Bridge V–1. The superstructure to be of the pin connected type as designated in the proposal, 14′ roadway steel joists, 3″ wood floor, lattice railing.

Cost—$3,619.00

Bridge No. 5 (&–2) over La Roux Fork north of Holbrook.

The design of this bridge and piers to be identical with that designated for Bridge No. 4 (T–1).

Cost—$3,919.00.

Bridge No. 6 (&–3) Cottonwood on Keam's Canon Road.

1 Span of 80′ resting on piers of solid concrete superimposed upon piling. The superstructure to be a pin connected truss, 14′ roadway, steel joists, 3″ wood floor, lattice railing.

Cost—$2,600.00

Bridge No. 7 (A–2) Cottonwood near Snowflake. 2 Spans of 130′ each resting on piers consisting

of H steel piling driven to an extreme depth and extending to the height of the shoe of the superstructure. The supersurface portion to be inclosed within a block of reinforced concrete carried down below the scour of the stream. On account of different subsurface conditions at this point a radically different style of substructure has been adopted The water-way of 160′ at this bridge is 100′ wider than that of the original estimate made by this office in 1915.

The superstructure to be two pin connected steel trusses, 14′ roadway, steel joists, 3″ wood floor, lattice railing.

Cost—$8,230.00

Bridge No. 8 (N.1) over Silver Creek near Snowflake.

It was intended and agreed that this bridge should be reconstructed out of material now on hand, but owing to changed conditions it is deemed advisable to award the work of erecting this bridge in addition to the other contracts, using 2 steel spans, 1 of 77′ and 1 of 52′ now on hand consisting of [194] new and intact member, resting upon piers to be constructed in the style and manner as those designated for the preceding bridge—No. 7.

Cost—$—Minimum

Bridge No. 9 (C–2) over Colorado south of Woodruff.

This is a short span and little work is involved, as the material is on hand and agreement has been made to erect this bridge by local labor.

Cost—$—Minimum

The original estimate of this office for the con-

struction of these 9 bridges was $63,000.00. Considering the unprecedented advance in the prices of structural steel since that estimate was made, it is gratifying to find that the sum is still adequate. Furthermore, an investigation has been made by this office relative to the supply of steel available in different localities of the United States, and the consequent ability of bridge contractors to furnish, erect and complete within a reasonable time the work under contemplation. With no intention of disparagement of other bidders, it is found that bidder No. 7 stands well toward the head of the list in this particular; it not only being a reliable contractor but a constructor of bridges within its own shops. It is, as well, fully able to guarantee its design to meet the standard requirements usual for this kind of work, and this guarantee should be incorporated in all contracts. Copper's General Specifications for Highway Bridges has been adapted as this standard and should be named as a guide for construction. In the course of investigation the fact developed that the bidder named was equipped and capable to prosecute and complete all of the work within a minimum time limit.

The items of major importance in all bridges are foundations and these must be such as will be stable and safe under all conditions which may arise.

In the general preliminary specifications which issued from this office, an advisory plan for piers was given and although this plan has since then received the commendation of several reputable engineers, it is recommended that it be left optional with

the County Engineer to substitute by agreement where desirable concrete filled large steel tubes for the subsurface portion of these piers in place of the solid block of concrete specified. This in no way will change the original plan for the subsurface portion nor be detrimental. Tubes in all cases will be of sufficient area to receive piling adequate to sustain the load to be imposed, viz., not more than 15 tons upon each pile.

In the final summary it will be seen that with reasonable care, excellent bridges, as adopted, can be constructed, inclusive of the approaches in all the 9 locations stipulated for or within the amount of the original estimate—$63,000.00.

As this office has used all diligence, care and has had consultation in ascertaining and weighing the facts and figures presented, it is presumed that the Honorable Board will not desire an exhaustive explanation of these, as they are such that can be and are set forth in a graphic form on the accompanying tabulation sheet.

Owing to the fact that the utmost deliberation has been [195] taken since the inception, adoption and receipt of the bridge, bond funds, and that the season has advanced to the most desirable time to commence construction work, it seems imperative that these contracts should be awarded and the work be put under way immediately. The pressure of public opinion seems to be in favor of this.

Respectfully submitted,

CHARLES E. PERKINS,

County Engineer.

[Endorsed]: Assignment of Errors. Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [196]

In the District Court of the United States, District of Arizona.

No. 56—PRESCOTT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

Upon motion of Thorwald Larson, County Attorney, and E. S. Clark and N. C. Clark, attorneys for the above-named defendant, Navajo County, and upon filing a petition for writ of error with assignment of errors duly set out.

IT IS ORDERED that a writ of error be, and it hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein; and

IT IS FURTHER ORDERED that upon the filing of a bond in the sum of Fifteen thousand ($15,000) Dollars by the defendant, approved by

the Judge of this court, that all further proceedings herein shall be suspended until the determination of this writ of error by the said Circuit Court of Appeals.

Dated this 25th day of October, 1924.

F. C. JACOBS,
Judge.

[Endorsed]: Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy. [197]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. L–56—PRCT.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States to the Honorable Judges of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is

now in the said District Court before you, between Navajo County, plaintiff in error, and Louis Mesmer, defendant in error, a manifest error has happened to the damage of Navajo County, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, [198] in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 25th day of October, in the year of our Lord one thousand nine hundred and twenty-four (1924).

[Seal] C. R. McFALL,
Clerk of the United States District Court for the District of Arizona.

By Paul Dickason,
Chief Deputy Clerk.

Allowed this —— day of October, 1924.

_____,

Judge of the United States District Court for the District of Arizona.

[Endorsed]: Filed Oct. 25, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk.

RETURN ON WRIT OF ERROR.

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court.

[Seal] C. R. McFALL,

Clerk of the United States District Court for the District of Arizona.

By M. R. Malcolm,
Deputy. [199]

In the United States District Court for the District of Arizona.

No. 56—PRESCOTT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon the writ of error heretofore sued out herein by the said Navajo County, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Plaintiff's original bill of equity.
2. Summons and return of service.
3. Plaintiff's original complaint.
4. Defendant's demurrer.
5. Defendant's motion to make more definite and certain.
6. Defendant's answer (motion to strike, etc., included).
7. Plaintiff's amended complaint.

8. Plaintiff's substitute paragraphs VI and VIII of amended complaint.
9. Defendant's answer to substitute paragraphs VI and VIII.
10. Defendant's motion for judgment. [200]
11. The judgment.
12. All minute entries in this cause.
13. Bill of exceptions.
13a. Proposed amendments to bill of exceptions.
14. Petition for writ of error.
15. Assignment of errors.
16. Supersedeas bond and approval.
17. Order allowing writ of error.
18. Original writ of error.
19. Original citation on writ of error.
20. All exhibits.
21. This praecipe.
22. Clerk's certificate.

The said transcript is to be filed with the clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, before

THORWALD LARSON,
County Attorney.
E. S. CLARK,
NEIL C. CLARK,
Attorneys for Navajo County, Defendant and Plaintiff in Error.

[Endorsed]: Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [201]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. L-56—PRCT.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

To Louis Mesmer, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, on the 24th day of November, 1924, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein Navajo County is plaintiff in error and Louis Mesmer is defendant in error, and there to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 25th day of October, 1924.

F. C. JACOBS,
United States District Judge for the District of Arizona. [202]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. L–56—PRCT.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

ADMISSION OF SERVICE OF CITATION ON WRIT OF ERROR.

Service of the foregoing citation in the above-entitled action is hereby admitted and accepted this 30th day of October, 1924.

GEORGE J. STONEMAN,
Attorney for Louis F. Mesmer,
1200 Broadway Arcade Bldg., Los Angeles Calif.

Received this writ on the 28th day of October, 1924, and executed the same by delivering a copy of this writ to George J. Stoneman, attorney of

record for the plaintiff, on the 30th day of October, 1924.

G. A. MAUK,
United States Marshal.
By W. P. McNair,
Deputy.

[Endorsed]: Filed Nov. 1, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [203]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, November 24th, 1924.)

No. L–56—(PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—NOVEMBER 24, 1924—ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS.

It is ordered by the Court that the clerk of this court is hereby authorized and directed to send up to the Circuit Court of Appeals all of the original

exhibits introduced and admitted in evidence at the trial of this case with the transcript of the record. [204]

In the United States District Court, District of Arizona.

No. L–56.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

APPLICATION OF ENLARGEMENT OF TIME TO FILE RECORD.

Comes now Navajo County, defendant herein, and applicant for writ of error to the United States Circuit Court of Appeals for the 9th Circuit, and respectfully applies to the Court to enlarge the time within which the record herein may be transmitted to said Circuit Court of Appeals, and in support of said application the said defendant submits the following grounds:

1. That November 24, 1924, the date of this application, is the return day and the day upon which said record should be lodged in said Circuit Court of Appeals.

2. That defendant has been delayed without

fault on its part, in securing the necessary supersedeas bond, having first applied to a number of surety companies, doing business in Arizona, and after losing a great deal of time, was advised that said companies did not write such bond.

3. That the defendant then procured the execution of a personal bond which was mailed from Holbrook, Arizona, to counsel for defendant, on the 22d day of November, 1924, as counsel [205] was advised by wire from the clerk of the Board of Supervisors of Navajo County. That said bond has not reached Phoenix and defendant's counsel are now tracing same.

That because of the foregoing circumstances defendant requests that the time within which said record may be transmitted to the United States Circuit Court of Appeals for the 9th Circuit be enlarged for the period of ten days, as provided in Rule 16 of said Circuit Court of Appeals.

Dated at Phoenix, Arizona, November 24, 1924.

THORWALD LARSON,
Co. Atty.

CLARK & CLARK,
Attorneys for Defendant.

[Endorsed]: Application of Enlargement of Time to File Record. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [206]

In the United States District Court for the District of Arizona.

No. L–56.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

ORDER ENLARGING TIME TO AND INCLUDING DECEMBER 4, 1924, FOR FILING RECORD WITH THE CLERK OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The defendant, and plaintiff in error herein, having applied for an enlargement of time within which to file the record of this case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and said application having been duly considered, and it appearing to the Judge of this court, who signed the citation for said writ of error, that good cause exists for said enlargement,—

IT IS HEREBY ORDERED, that the time within which said record may be filed and docketed be, and the same is, hereby enlarged for the period of ten days from and after the date hereof, to

wit, until and including the 4th day of December, 1924.

Dated this 24th day of November, 1924.

F. C. JACOBS,

Judge of the United States District Court, District of Arizona.

[Endorsed]: Order Enlarging Time for Filing Record with the Clerk of the United States Circuit Court of Appeals. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [207]

In the United States District Court, District of Arizona.

No. 56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

SUPERSEDEAS AND APPEAL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Navajo County, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Louis F. Mesmer, in the sum of Fifteen Thousand ($15,000.00) Dollars, to be paid to the said Louis F. Mesmer, his

successors and assigns, for payment of which, well and truly to be made, we bind ourselves, our administrators, executors and assigns, jointly and severally by these presents.

Signed and dated this 22d day of November, 1924.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Arizona, sitting at Phoenix in said District in a suit pending in said court between Louis F. Mesmer as plaintiff, and Navajo County, as defendant, Cause No. L–56 on the Law Docket of said court, final judgment was rendered against said Navajo County in the sum of Thirteen Thousand Eight Hundred and Seventy-two 65/100 ($13,972.65) Dollars, and costs taxed at One Hundred and Fifty-two Dollars and Ten Cents ($152.10), with interest thereon at the rate of six per cent (6%) per annum from date thereof [208] until paid; and the said Navajo County has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment of said court in said suit, and a citation directed to said Louis F. Mesmer, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, according to law within thirty (30) days from the date hereof.

Now, the condition of the above obligation is such that if the said Navajo County shall prosecute its writ of error to effect and answer all damages and

costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NAVAJO COUNTY.
By C. E. OWENS,
C. G. PAYNE,
JOSEPH PETERSON,
Its Board of Supervisors.

[Seal of Navajo County]
Attest: WALLACE ELLSWORTH,
Clerk of the Board of Supervisors.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Surety.

[Corporate Seal] LLOYD C. HENNING,
Attorney-in-Fact.

Approved this 25th day of November, 1924.
F. C. JACOBS,
Judge.

[Endorsed]: Supersedeas and Appeal Bond. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [209]

In the United States District Court, District of Arizona.

No. 56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Louis Mesmer, an Individual, *versus* Navajo County, said case being Number 56—Prescott on the docket of said court.

I further certify that the foregoing 209 pages, numbered from 1 to 209, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this tran-

script as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed [210] to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Ninety-four and 80/100 Dollars ($94.80), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and seal of said court this 29th day of November, 1924.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona.

By Paul Dickason,
Chief Deputy. [211]

[Endorsed]: No. 4412. United States Circuit Court of Appeals for the Ninth Circuit. Navajo County, Plaintiff in Error, vs. Louis F. Mesmer, an Individual Doing Business Under the Name and Style of Mesmer & Rice, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed December 1, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.